Supreme Court, U.S.
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In The

Supreme Court of the United States

KIP R. RAMSEY, d/b/a TIIN-MA LOGGING CO.;
TIIN-MA LOGGING CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether previous opinions of this Court,[1] applying the canons of Treaty construction to construe the language "the right of taking . . . *in common with citizens of the territory*" in Article III, Paragraph 2, of the Treaty with the Yakamas of 1855 (12 Stat. 951), and finding that the "right . . . in common with" language reserved to the Yakama specific and special rights to take fish are in direct conflict with the opinions of the Court of Appeals for the Ninth Circuit in this case finding that identical language in the same Treaty article provided Yakamas with no special and specific rights as to travel on the public highways.

2. Whether the opinion below finding that the terms "in common with" and "right to travel . . . " in Article III provide Yakamas no rights is in direct conflict with this Court's opinion in *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), construing the same language to grant specific rights to Yakama Indians.

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[1] *United States v. Winans*, 198 U.S. 371 (1905); *Suefert Bros v. United States*, 294 U.S. 194 (1918); *Tulee v. State of Washington*, 315 U.S. 682 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

QUESTIONS PRESENTED – Continued

3. Whether the reasoning of the opinion of this Court in *Tulee v. Washington*, 315 U.S. 682 (1942), construing the "in common with" language of Article III, Paragraph 2, of the Treaty with the Yakama of 1855 (12 Stat. 951) as reserving to Yakama tribal members the right to take fish without payment for fees for that right, conflicts with the Court of Appeals' ruling that the identical language of Article III, Paragraph 1, of the Treaty regarding the right of Yakama Indians to haul tribally produced goods to market on the public highways free of the Federal diesel and heavy vehicle use tax, provided no similar exemption.

4. Whether the Court of Appeals' opinion requiring that an Indian Treaty must contain "express exemptive language" on its face before it may qualify an Indian for a Federal tax exemption is in direct conflict with prior rulings of this Court in *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), and *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), holding that such language need only be "clearly expressed" with all doubtful terms and expressions construed in favor of the Indians.

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PETITION FOR A WRIT OF CERTIORARI

Kip R. Ramsey, d/b/a Tiin-Ma Logging Co., and Tiin-Ma Logging Co. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A *infra* 1a to 11a) is reported at 302 F.3d 1074. The opinion of the District Court (App. B *infra* 12a to 26a) is unreported. There are two other opinions that bear directly on the Treaty interpretation issue before the Court. The Court of Appeals' opinion, *Cree v. Flores* (App. *infra* 59a to 87a) is reported at 157 F.3d 762 (9th Cir. 1998). The District Court opinion, *Cree v. Flores* (App. *infra* 88a to 182a) is reported at 955 F.Supp. 1229 (E.D. Wash. 1997).

JURISDICTION

The Court of Appeals entered its judgment on September 11, 2002. A Petition for Rehearing was denied by the Court of Appeals on December 23, 2002 (App. E *infra* 28a). On March 17, 2003, Justice O'Connor granted an extension of time for filing of this Petition to and including April 22, 2003 (App. D *infra* 27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction in the original action in the District Court was invoked pursuant to 28 U.S.C. 1346(a)(1), as this was an action for the refund of Federal excise taxes.

TREATY PROVISIONS INVOLVED

This case involves the Treaty with the Yakama of June 9, 1855 (12 Stat. 951). The Treaty is set forth in full in Appendix G at Pages 35a to 43a. The specific provision of the Treaty, with the applicable language in bold, here in question is Article III, Paragraph 1:

ARTICLE III.

> ***And provided,*** That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest highway, **is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways**.

TREATY RECORDS INVOLVED

Also involved are what are generally referred to as the "Treaty Minutes" comprising the record of the Treaty proceedings at Walla Walla, Washington in May and June of 1855. Those "Minutes" are formally titled:

> "A true copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley held jointly by Isaac I. Stevens Gov. & Supt. W.T. and Joel Palmer Supt. Ind. Affairs O.T. on the part of the United States with the Tribes of Indians named in the Treaties made at that Council June 9th and 11th 1855."

These records are voluminous, but pertinent portions are set forth below:

"I will give briefly the reason for selection [of] these two Reservations . . . **You will be near the great road** and can take your horses and your cattle down the river and to the Sound to market." Record of proceedings, Statement of Governor Stevens to Yakamas (Records Page 64, App. G *infra* 45a).

"You will be allowed to pasture you [sic] animals on land not claimed or occupied by settlers, white men. **You will be allowed to go on the roads to take your things to market, your horses and cattle.** You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites. **All that outside the Reservation**." Record of proceedings, Statement of Governor Stevens to Yakamas (Records Page 67, App. G *infra* 48a to 49a).

"They shall have the same liberties outside the Reservation to pasture animals on land not occupied by whites, to kill game, to get berries and **to go on the roads to market.**" Record of proceedings, Statement of Governor Stevens to Yakamas (Records Page 69, App. G *infra* App. 52a).

"Gov. Stevens: I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this Reservation settlers cannot go, that he can graze his cattle outside of the Reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, **that he can kill game and can go to buffalo when he pleases**, that he can get roots and berries on any of the lands not occupied by settlers." Record of proceedings, Statement of Governor Stevens to Nez Perce and Yakamas (Records Page 102, App. G *infra* 57a).

> "My brother has stated that you will be **permitted to travel the roads** outside the Reservation." Record of proceedings, Statement of General Palmer to Yakamas (Records Page 70, App. G *infra* 53a).
>
> "Now as we give you the privilege of **traveling over the roads**, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for injury." Record of proceedings, Statement of General Palmer to Yakamas (Records Page 71, App. *infra* 55a).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes which are set out in full in Appendix F at Pages 29a to 34a:

> 26 U.S.C. 4041; 26 U.S.C. 4081; 26 U.S.C. 4083; 26 U.S.C. 4091; 26 U.S.C. 4092; and 26 U.S.C. 4481.

STATEMENT OF THE CASE

This is a case for refund of Federal heavy vehicle use taxes paid pursuant to 26 U.S.C. 4481 (App. F *infra* 34a) and Federal diesel fuel taxes paid pursuant to 26 U.S.C. 4041, 26 U.S.C. 4081, 26 U.S.C. 4083, 26 U.S.C. 4091 and 26 U.S.C. 4092 (App. F *infra* 29a to 33a). The basis for the refund claim is Petitioner's assertion that as an enrolled member of the Yakama Nation, he is entitled to an exemption from these taxes pursuant to the provisions of the Treaty with the Yakamas of June 9, 1855 (12 Stat. 951) (hereafter Treaty) (App. G *infra* 35a to 43a), particularly

the provisions of Article III, Paragraph 1, of that Treaty which reads as follows:

> ***And provided,*** That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, **is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways**. [Emphasis added]

Ramsey's position is that the bolded language of Article III, Paragraph 1, above was understood by the Yakamas at the time of the Treaty to provide them the *unfettered* right to travel on the public highways of the United States, without having to pay taxes for that right. Ramsey asserts that the language of Article III, Paragraph 1, when interpreted under the canons of construction applied to doubtful terms in Treaties, provides an express exemption from Federal highway taxes. Ramsey brought this refund action following the decisions of the District Court for the Eastern District of Washington in *Cree v. Flores*, 955 F.Supp. 1229 (E.D. Wash. 1997; App. *infra* 88a to 182a), and the Ninth Circuit upholding that decision in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998; App. *infra* 59a to 87a), with the Ninth Circuit there holding with regard to Article III, Paragraph 1, of the Treaty:

> We agree with the district court that, in light of those and its other findings, **the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use**. *Cree v. Flores*, *supra* at 769, App. *infra* 72a). [Emphasis added]

In the opinion here in question, the Ninth Circuit rejected the reasoning of the panel in *Cree*, *supra*. It held that *Cree* dealt only with the issue of State taxation, and in the context of Federal taxes, the Treaty clause construed by the Court in *Cree* to provide free use of the public highways did not contain "express exemptive language," was not subject to interpretation under the canons of Indian Treaty construction, and, accordingly, did not qualify Ramsey for a Treaty based tax exemption. *Kip R. Ramsey, et al. v. United States*, 302 F.3d 1074, 1080, (9th Cir. 2002, App. A *infra* 1a to 11a).

A. Position of Ramsey

Petitioner Kip R. Ramsey, d/b/a Tiin-Ma Logging Co., and Tiin-Ma Logging Co. (hereafter Ramsey) is a sole proprietorship[2] owned and operated by Ramsey on land held in trust for him by the United States within the Yakama Indian Reservation in the State of Washington. Ramsey is an enrolled member of the Federally recognized Confederated Tribes and Bands of the Yakama Nation. He operates a logging business which harvests trees from the Yakama Nation's forest on lands held in trust for that Nation and its individual members. Ramsey then hauls those logs to sawmills both on and off the Reservation, using heavy logging trucks and traveling on private County, State and Federal highways. In order to operate his trucks on the public highways, he has been required to

[2] In spite of the "Co." designation of the business name, Ramsey's business is not incorporated and is solely owned by him as an individual Yakama Indian.

pay the Federal heavy vehicle use tax and Federal diesel fuel taxes.

Ramsey, as a Yakama tribal member, has long asserted that the unique language of Article III, Paragraph 1, of the Yakama Treaty reserved to the Tribe and its members the right to travel the public highways without the payment of fees or taxes for that use.[3] He has litigated this issue for nearly ten years against the State of Washington. His efforts against the State concluded with the decision in his favor by the Ninth Circuit in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (App. H *infra* 59a to 87a). These claims for refund followed.

It is important for the Court to note that the tax free use of the public highways asserted here is one limited in its scope. Ramsey asserts only his right, as a Yakama tribal member, to haul what the prior Court rulings have held to be "tribal goods over the public highways." District Court ruling, *Ramsey v. U.S.A.*, unreported (App. B *infra* 13a), *Cree v. Flores*, 955 F.Supp. 1229, 1252, 1253, (App. I *infra* 88a to 182a). There is no effort to assert this right to uses other than those tied directly to tribal members and to the hauling of "tribal goods" – in this instance, logs harvested on the Reservation. There is no contention that the Treaty exempts Ramsey from following all of the rules

[3] The language of Yakama Treaty Article III, Paragraph 1, here in question is contained in only two other Treaties in the United States. See *Cree v. Flores*, 157 F.3d 762, 772 (9th Cir. 1998), one of which was negotiated at the same proceeding as the Yakama Treaty, and the other, the Flathead Treaty, a few weeks later. The Yakama Treaty and its Minutes, as discussed *infra*, reflects the basis for the inclusion of this unique "right to travel" in its Treaty.

of the road, including weight restrictions, speed, safety, etc.

B. Proceedings Below

Following the denial of Ramsey's refund claims by the IRS, Ramsey filed suit in the Federal District Court for the Eastern District of Washington. In that action, Ramsey asserted that Article III, Paragraph 1, of the Treaty, reserved to him the right "to travel the public highways" "in common with citizens of the United States" free of taxes and fees. Ramsey asserts that Article III, Paragraph 1, is language that can be construed, under the Treaty canons of construction, to constitute language which clearly expresses a tax exemption. This position was based upon both the language of the Treaty cited, *supra*, the decision in *Cree*, *supra*, and the many decisions of this Court, discussed *infra*, which applied the canons of Treaty construction to virtually identical language in Treaty Article III, Paragraph 2. It is further based on the Indian tax decisions discussed *infra* requiring application of those same canons of construction.

Both parties moved for summary judgment in the District Court. In support of his motion, Ramsey filed the identical exhibits used by him in the *Cree*, *supra*, proceeding, together with affidavits from the same experts he used in that proceeding.[4] The United States presented no

[4] The decision and findings of the District Court in *Cree v. Flores*, 955 F.Supp. 1229 (E.D. Wash. 1997, App. I *infra* 88a to 92a), provide an excellent factual background on this case and the Yakama Treaty negotiations, and discuss the exhibits presented there and in this case. Ramsey's Local Rule 56(b) Statement of Material Facts (App. J *infra* 183a

(Continued on following page)

controverting exhibits or declarations and did not contest Ramsey's factual assertions, choosing instead to rely solely on the legal argument that the Yakama Treaty contained no "express exemptive language."

Both parties presented an Eastern District of Washington Local Rule 56(b) "Statement of Material Fact Re Motion for Summary Judgment." (Ramsey's Statement, App. J *infra* 183a to 190a). Under local court rules, the facts presented there are deemed admitted unless specifically rebutted.

The following uncontested facts regarding the parties' understanding of the "right to travel . . . public highways" language were before the District Court and Court of Appeals below:

> 9. That the Yakama Chiefs would not have signed the Treaty had they believed it would condition their ability to travel on the public highways upon the payment of a fee or tax. Yallup Declaration, Page 5, lines 1-4.
>
> 12. That continued free access to travel was a primary concern of the Yakama in 1855, and that concern was well known to the Chief U.S. Treaty negotiators, Governor Isaac Stevens and General Joel Palmer. Walker Declaration, Page 4, lines 16-22; Page 7, lines 1-13.

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to 190a), which as noted above was uncontested by the United States, is based upon the exhibits, declarations and testimony in *Cree*, *supra*, and these same exhibits and declarations filed in support of Ramsey's Motion for Summary Judgment in this case.

> **13. That the Yakamas and the United States, in the Treaty of 1855, specifically understood and agreed that the Yakamas would retain the right of off-Reservation travel on the highways, without the payment of fees or taxes of any nature.** Walker Declaration, Page 7, lines 15-19. [Emphasis added]
>
> 14. That the Yakamas, in the Treaty negotiations, bargained for and understood that the Treaty provided unrestricted free of any fees or taxes, travel upon public highways that would in the future be constructed by non-Indians. Walker Declaration, Page 8. (All included in Plaintiff's Statement of Material Facts, App. J *infra* 183a to 190a.)

The District Court (App. B *infra* 12a to 26a), relying upon Ramsey's unrebutted exhibits, declarations and Statement of Material Facts, held that the reasoning in the *Cree* cases, *supra*, regarding Article III, Paragraph 1, was correct, and that application of the canons of Treaty construction to Article III, Paragraph 1, resulted in a finding that a Federal tax exemption was present in the Yakama Treaty. (*Ramsey v. U.S.*, unreported, App. B *infra* 21a, 22a).

On appeal, the Ninth Circuit reversed, determining that it need not apply the canons of Treaty interpretation to Article III, Paragraph 1:

> *Cree II*'s interpretation, however, is not binding on the question of *federal* taxation because the initial inquiry when exempting Indians from *federal* taxes is whether the federal law in question contains express exemptive language at all. **The canon of construction favoring the Indian**

> **when ambiguities are present in a statute or treaty does not come into play absent such language.** *Ramsey v. U.S.*, 302 F.3d 1074, 1079 (App. A *infra* 10a).
>
> Indeed, the clause granting the Yakama the "right, in common with citizens of the United States, to travel upon all public highways" contains no exemptive language. **"In common with" does not express an intent to exempt the Yakama from taxes.** Thus, there is no express exemptive language in the Treaty to exempt the Yakama from the generally applicable, federal heavy vehicle and diesel fuel taxes. *Id.* at 1080 (App. A *infra* 11a).

In making its determination not to apply the canons of construction to Article III, Paragraph 1, the Ninth Circuit further determined that Treaty language must first "provide evidence of *the Federal government's intent* to exempt Indians from taxation," *Ramsey*, *supra* at 1078 (App. A *infra* 8a). It then went on to determine a "bright line" nature of Treaty language that was necessary to constitute "express exemptive language" for purposes of Federal tax exemptions, *which must be present* on the face of the Treaty before the canons of construction will be applied:

> Treaty language such as "free from incumbrance," "free from taxation," and "free from fees," are but some examples of express exemptive language required to find Indians exempt from federal tax. *Id.* at 1078. (App. A *infra* 8a)

The Court of Appeals denied Ramsey's Petition and Petition for Rehearing and En Banc.

REASONS FOR GRANTING THE PETITION

This Court has, in four previous decisions,[5] construed the language of Article III of the Yakama Treaty, the same Treaty Article here at issue. By application of the canons of Treaty construction to Article III, this Court has consistently held that its language reserved specific and important rights to the Yakamas. In each of those opinions, this Court has emphasized the importance of applying the canons of construction to Article III in order to interpret it as the Yakamas understood it at the Treaty grounds in Walla Walla in 1855. The opinion of the Court of Appeals here, in refusing to apply the canons of construction to the language of Article III, is in direct conflict with the reasoning and holding of those cases.

The opinion of the Court of Appeals, in failing to give meaning to the term "in common with" and "right to travel . . . public highways" in Article III of the Yakama Treaty is in direct conflict with this Court's opinion in *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), construing Article III of the Yakama Treaty, and giving these terms specific meaning "in the manner in which the Indians understood them."

The opinion of the Court of Appeals, in finding that the provision of Article III, Paragraph 1, contained no language that would exempt Petitioner from paying fees for the exercise of his Treaty rights, is in direct conflict

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[5] *United States v. Winans*, 198 U.S. 371 (1905); *Suefert Bros. v. United States*, 294 U.S. 194 (1918); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

with this Court's holding in *Tulee v. State of Washington*, 315 U.S. 682 (1942), that identical language in Paragraph 2 prohibited the collection of fees or taxes for the exercise of Yakama's reserved Treaty rights.

The opinion of the Court of Appeals is in direct conflict with the opinions of this Court in *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), and *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), requiring the application of the Treaty canons of construction to Treaty terms in order to determine whether an exemption from Federal taxation is expressly stated. It is further in conflict with the decisions in these cases as it establishes a requirement that a Treaty contain "express exemptive language" before it may be treated as creating a Federal tax exemption, in contravention of those holdings that such language need be only "clearly expressed."

This case also provides the Court with its first clear opportunity to explore and establish an Indian *Treaty based exemption* from Federal excise taxes, as opposed to its previous cases which involved only the interpretation of statutory provisions.

I. PRIOR RULINGS OF THIS COURT REQUIRING APPLICATION OF THE TREATY CANONS OF CONSTRUCTION TO INTERPRET THE TERMS OF ARTICLE III, PARAGRAPH 2, OF THE YAKAMA TREATY, MANDATE THAT THE COURT OF APPEALS APPLY THE CANONS TO THE VIRTUALLY IDENTICAL LANGUAGE OF ARTICLE III, PARAGRAPH 1, TO DETERMINE ITS MEANING RELATIVE TO WHETHER THE YAKAMAS UNDERSTOOD IT TO EXEMPT THEM FROM THE PAYMENT OF TAXES WHEN EXERCISING THEIR "RIGHT TO TRAVEL . . . PUBLIC HIGHWAYS."

The determination of the meaning of a "right . . . " reserved "in common with citizens of the United States" (or Territory in some Stevens' Treaties) has a long history before this Court. Persons and States who opposed the reservation of special rights to Yakama and its members under Article III have long argued that the term "in common with" meant simply that the Treaty reserved nothing more to the Tribe than it did to any other citizen. This Court, on no fewer than four previous occasions, rejected that argument, finding that the provisions of Article III regarding such rights were "doubtful expressions," or expressions "fairly capable of two interpretations," and, accordingly, applied the canons of construction to determine their meaning as the Indians understood them.

Beginning in 1905, in *United States v. Winans*, 198 U.S. 371 (1905), this Court found that the "right of taking fish in common with citizens . . . ," as understood by the Indians encompassed larger rights than just those held by ordinary citizens:

> The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. *Indeed, acquired no rights but such as they would have without the treaty*. **This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more.** And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality . . .

In *Winans*, the Court found the language "right to take fish in common with citizens . . . " included perpetual easements over private lands even though the Treaty was silent on that issue.

Fourteen years later, in *Suefert Brothers Co. v. United States*, 249 U.S. 194 (1919), this Court held that the language "right to take fish . . . " discussed in *Winans*, *supra*, imposed the same easement on lands in the State of Oregon, even though Oregon was outside the boundaries of the lands ceded by the Yakamas:

> This recital of the facts and circumstances of the case renders it unnecessary to add much to what was said by this court in *United States v. Winans*, 198 U.S. 371, in which this same provision of this treaty was considered and construed. . . .
>
> To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of

> the treaty, . . . *and would substitute for the natural meaning of the expression used, . . . the artificial meaning which might be given to it by the law and by lawyers. Suefert, supra,* at 198, 199 [Emphasis added]

On its third visit to Article III, this Court determined that the "right of taking fish in common with citizens . . . " specifically included the right to do so without *the payment of fees* for its exercise:

> Viewing the treaty in this light *we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. . . .*
>
> Even though this method may be both convenient and, in its general impact fair, *it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. Tulee v. State of Washington,* 315 U.S. 862, 864, 865 (1942). [Emphasis added]

In 1979, this Court made its last interpretation of Article III of the Yakama Treaty, in the case of *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 677, 678 (1979):

> *It is true that the words "in common with" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves. . . .* But we think greater importance should be given to the Indians' likely understanding of the other words in the treaty and especially *the reference to*

> *the "right of **taking** fish" – a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. . . .*
>
> This interpretation is confirmed by additional language in the treaties. The fishing clause speaks of "securing" certain fishing rights, *a term the Court has previously interpreted as synonymous with "reserving" rights previously exercised.* [Emphasis added]

Recitation of this Court's many experiences with the fishing right provisions of the Yakama Treaty is not intended to assert that those specific interpretations were binding on the Court of Appeals' determination regarding whether a Federal tax exemption exists under the "right to travel" provision. Instead, they are set forth to illustrate that virtually identical language, included in the same Treaty article, has been given broad and important meaning by this Court:

> *The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians' fishing rights. . . .* [Emphasis added] *Washington State Commercial Passenger Fishing Vessel Ass'n., supra*, at 679.

In contrast to the Court of Appeals' opinion which ignores the meaning of Paragraph 2's reserved "right to travel . . . public highways . . . " and specifically holds that "in common with" secured no rights. *Ramsey, supra*, at 1080 (App. A *infra* 11a).

By failing to ascribe any meaning to this Treaty provision, the Court of Appeals ignored this Court's numerous

clear holdings that "rights" secured under Article III *do have specific meaning* and must be interpreted through use of the canons, *Winans*, *Suefert*, *Tulee*, *Passenger Fishing Vessel Ass'n*, all *supra*, and failed to give meaning to the Treaty as a whole. *Chickasaw Nation v. U.S.*, 84, 94 (2001). The language of Article III clearly and specifically secures a "right to travel," just as it "secured" a "right to take fish." This Court, as noted in *Passenger Fishing Vessel Ass'n*, *supra*, interprets the term "secured" to mean "reserving rights previously exercised." Here, the right asserted by Petitioner is to travel as the Yakamas did in 1855 – free and without taxes – and in the manner agreed to by the United States in the Treaty "*upon all public highways*." That right is clear when Article III, Paragraph 1, is construed as the Yakamas understood it.

Under the holdings cited above, the Court of Appeals erroneously ignored the obvious mandate that Article III, Paragraph 1, is subject to construction and interpretation under the canons of Treaty construction, just as was Paragraph 2 of the same Article. As is set forth in Argument IV, *infra*, such interpretation under the canons of construction is just as appropriate in Federal tax cases as it is in the fishing context. To hold otherwise is in direct conflict with the four previously discussed opinions of this Court.

II. THE OPINION OF THE COURT OF APPEALS' REFUSING TO CONSTRUE THE TERM "IN COMMON WITH," AND FAILING TO IN ANY MANNER CONSIDER THE TERM "RIGHT TO TRAVEL ... PUBLIC HIGHWAYS" IS IN DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN *WASHINGTON V. WASHINGTON STATE PASSENGER FISHING VESSEL ASS'N*, 443 U.S. 658 (1979), WHICH HAS ALREADY APPLIED THE CANONS OF CONSTRUCTION TO THE SAME LANGUAGE IN THE YAKAMA TREATY.

In Argument I, Petitioner asserts that the action of the Court of Appeals was in conflict with the opinions of this Court requiring applications of the canons of construction. Here, Petitioner asserts that the Court of Appeals' opinion is in direct conflict with the actual holding of a case cited in Argument I.

In *Passenger Fishing Vessel*, *supra*, at 677, 678, this Court specifically determined that the words "in common with" were subject to differing interpretations and were not understood by the Yakamas to limit their Treaty fishing rights, and in fact secured to them a 50% share of the fishery resource. It also determined that the term "right to take fish" was also subject to interpretation under the canons of construction, and was understood by the Yakamas to encompass Treaty fishing rights as they were exercised at the time of the Treaty.

Conversely, the Court of Appeals here, in direct conflict with the holding that "in common with" is ambiguous and subject to interpretation, specifically held that the term "in common with" was subject to only one interpretation – that Article III, Paragraph 1, secured no greater

rights than those held by non-Indian citizens – and, accordingly, could not be subject to the canons of construction: " . . . in common with does not express an intent to exempt the Yakamas from taxes." *Ramsey*, *supra*, at 1080 (App. A *infra* 11a).

The Court of Appeals, again in direct conflict with this Court's *Passenger Fishing Vessel Ass'n*, *supra*, ruling, failed to even discuss the "right to travel . . . public highways" language of Paragraph 1, thereby giving no meaning to that critical portion of the Treaty language.

The Court of Appeals' action in failing to construe the language of Article III, Paragraph 1, is in stark contrast to and in direct conflict with the holding in *Passenger Fishing Vessel Ass'n*, *supra*, requiring this Court to grant the Petition.

III. THE OPINION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S RULING IN *TULEE V. WASHINGTON*, 315 U.S. 682 (1942), CONSTRUING ARTICLE III OF THE YAKAMA TREATY AS PROVIDING AN EXEMPTION FOR TAXES IN THE EXERCISE OF RIGHTS SECURED BY THAT ARTICLE.

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. . . .
>
> Viewing the treaty in this light *we are of the opinion that the state is without power to charge the Yakimas a fee for fishing . . . it acts upon the*

> *Indians as a charge for exercising the very right their ancestors intended to reserve. Tulee, supra,* at 684, 685 (citations omitted) [Emphasis added]

In Argument I, Petitioner asserts that the action of the Court of Appeals was in conflict with the opinions of this Court requiring applications of the canons of construction. Here, Petitioner asserts that the Court of Appeals' opinion is in direct conflict with the actual holding of a case cited in Argument I.

Here, the issue is the "*right to travel . . . public highways*" contained in the same paragraph and couched in the same terms as the language construed in *Tulee, supra.* There is nothing on the face of the Treaty, or in the records of the Treaty proceedings, that reflect that the parties intended it to be given less import than the fishing clause, nor is there anything to reflect that the parties intended it to secure any less important rights.

The reasoning of this Court in *Tulee, supra,* its determination that the language of Article III of the Yakama Treaty regarding the "rights" secured therein was capable of two interpretations, and, accordingly, its application of the canons to determine the Indian understanding, compels the same result with Paragraph 1 of Article III. As the uncontested facts in this case reflect (Plaintiff's Local Rule 56(b) Statement of Material Fact re: Motion for Summary Judgment, App. J *infra* 187a, No's 12-15), both parties to the Treaty understood and intended that it secured tax free travel to the Yakamas. Had the Court of Appeals followed the law as set forth by *Tulee, supra,* and *Passenger Fishing Vessel Ass'n, supra,* (and as analyzed by the District Court in this case, App. B *infra* 12a to 26a, and the Courts in *Cree v. Flores,* App. H, I *infra* 59a to 87a, and 88a to 182a), it would have found that the language of

Article III, Paragraph 1, of the Treaty "clearly expressed" a "right to travel" exempt from the taxes in question.

IV. THE COURT OF APPEALS DECISION REQUIRING THAT A TREATY CONTAIN ON ITS FACE "EXPRESS EXEMPTIVE LANGUAGE" CONFLICTS WITH THE OPINIONS OF THIS COURT REQUIRING ONLY THAT A TAX EXEMPTION BE "CLEARLY EXPRESSED."

The Court of Appeals, in holding that Article III, Paragraph 1, of the Yakama Treaty provided no exemption from the taxes in question stated:

> The applicability of a federal tax to Indians depends on whether express exemptive language *exists within the text of the statute or treaty*. The language need not explicitly state that Indians are exempt from the specific tax at issue; it must only **provide evidence of the federal government's intent to exempt Indians from taxation. Treaty language such as "free from incumbrance," "free from taxation," and "free from fees," are but some examples of express exemptive language required to find Indians exempt from federal tax.** *Ramsey v. U.S.*, *supra*, at 1078 (App. A *infra* 8a).

It then determined that no "express exemptive language," as it had narrowly defined that term, existed in Article III, Paragraph 1, and, accordingly, the canons of construction were inapplicable:

> Only if express exemptive language is found in the text of the statute or treaty should the court determine if the exemption applies to the tax at issue. **At that point, any ambiguities as**

> **to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians.** *Ramsey v. U.S.*, *supra*, at 1079 (App. A *infra* 8a).

This holding, by requiring a finding of "express exemptive language" on the face of a Treaty or statute before applying the canons of construction, creates a situation in which those canons *would never be applicable*, as the use of the canons only arise when necessary to resolve ambiguities or determine doubtful Treaty language in favor of the Indians. A requirement that a Court first find "express" language on the face of the Treaty provides for no possibility of ambiguity or doubt, and, accordingly, would never give rise to a need for construction, an interpretation of Treaty law that has no support under the decisions of this Court.

This determination of a "bright line" test requiring the presence of "express exemptive language" on the face of a Treaty or statute *before* application of the canons of construction to determine if an exemption is "clearly expressed" effectively negates the landmark Indian tax decisions of this Court discussed below, as well as several cases of the Ninth Circuit itself.[6]

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[6] See the holdings of the Ninth Circuit in *U.S. v. Anderson*, 625 F.2d 910, 913 (9th Cir. 1980), and *Hoptowit v. Commissioner*, 709 F.2d 564, 565 (9th Cir. 1980):

> "Although ambiguous statutes and treaties are to be construed in favor of Indians, they are not to be construed to grant tax exemptions **unless they contain language which can reasonably be so construed.**" [Emphasis added] As is argued in Sections I, II and III hereof, the terms "in common with" and "the right to travel . . . public

(Continued on following page)

In *Choate v. Trapp*, 224 U.S. 665 (1912), this Court established the bedrock rule for interpretation of Treaties regarding Indian exemptions from tax, requiring that the Courts employ a liberal construction of Indian statutes and Treaties:

> Such exemption was a mere bounty, valuable as long as the state chose to concede it, but **as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.**
>
> **But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal;** doubtful expressions, ***instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.*** **This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.** *Choate v. Trapp*, 224 U.S. 665, 675, 56 L.Ed. 941 (1912). [Emphasis added]

While *Choate* dealt with State tax exemptions, its principles requiring broad and liberal construction are cited with favor and adopted by this Court in *Squire v. Capoeman*, 351 U.S. 1 (1956), the seminal case on Treaty or statutory exemptions from Federal taxes. The *Squire*

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highways" are words which "can reasonably be so construed" so as to provide an exemption. Had the Ninth Circuit adopted a "bright line" there as it asserts here, the term "reasonably be so construed" would have been superfluous in those opinions.

Court held that while a tax exemption must be "clearly expressed" in a Treaty or statute, such a "clear expression" must be determined after examination of the language of the statute or the Treaty, and it need not be "expressly couched in terms of nontaxability":

> We also agree that, to be valid, exemptions to tax laws should be clearly expressed. **But we cannot agree that taxability of respondents** in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act. . . .
>
> Although this statutory provision **is not expressly couched in terms of nontaxability**, this Court has said that **doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.** Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. **If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.**" *Squire*, *supra*, at 6, 7.

As Petitioner sets forth in Argument I, *supra*, the terms "in common with" and a "right . . . " secured "in common with" in Article III of the Yakama Treaty have previously been determined by this Court to be "words susceptible of a more extended meaning . . . " as that term is used in the above quote from *Squire*. The Court of Appeals ignored that long established law concerning the Yakama Treaty when it failed to construe the language of Article III under the canons of construction.

The most recent ruling on this issue, *Chickasaw Nation v. U.S.*, 534 U.S. 84 (2001), makes clear that no "bright line" of "exemptive" words governs when and if the canons of construction should be applied in the context of Federal tax exemption, instead reiterating the holdings of this Court in *Choate*, *supra*, and *Squire*, *supra*:

> In this instance, to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote. Cf. . . . (same);. . . . **In light of the considerations discussed earlier, we cannot say that the statute is "fairly capable of two interpretations"**, cf. *Montana v. Blackfeet Tribe*, *supra*, at 766, nor that the Tribes' interpretation is fairly "possible." . . .
>
> Moreover, the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions **unless those exemptions are clearly expressed**. . . . **Nor can one say that the pro-Indian canon is inevitably stronger – particularly where the interpretation of a congressional statute rather than an Indian Treaty is at issue**. Cf. *post*, at 7 (O'Connor, J., dissenting). This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength. *Chickasaw*, *supra*, at 94-96. [Citations omitted, emphasis added]

Again, this Court requires a "clear expression" of a tax exemption, but recognizes that such a "clear expression" may arise under specific language or as a result of the

application of the canons in appropriate circumstances. As has been argued above and in Argument Nos. I, II and III, construction of the language of Article III of the Yakama Treaty under the canons has always been employed by this Court.

Since at least 1912 with the ruling in *Choate*, *supra*, this Court has consistently held that Treaty language providing a tax exemption need only be "clearly expressed" and the determination of such a "clear expression" must occur under application of the canons of Treaty construction when a Treaty or statutory provision was "doubtful" or "capable of two interpretations" as to exemption from the tax at issue. None of those rulings discussed or imposed a bright line requirement for "express exemptive language." *Squire*, *supra*, in fact was very specific that language allowing an exemption need not be "couched in terms of nontaxability." The recent ruling in *Chickasaw*, *supra*, at 96, again makes clear that there is no bright line test for "clearly expressing" tax exemptions, and that they must be determined through use of the canons of construction:

> This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength.

Obviously, the Courts of Appeals must look at Federal tax matters on a case-by-case basis, and apply the canons of construction to doubtful provisions to ascertain whether the Treaty contains language which "clearly expresses" an exemption.

Requiring that a Treaty negotiated in 1855 guaranteeing a "right to travel ... the public highways" contain

"express" words exempting that travel from heavy vehicle and diesel fuel taxes when neither existed in 1855 obviously violates this Court's stricture against giving Treaty language "the artificial meaning which might be given to it by the law and lawyers." Instead, the Treaty parties simply made it clear that the "right to travel . . . public highways" was reserved to the Yakamas regardless of how it might be exercised in the future, and exempt from later enacted fees or taxes for its exercise. This Court, in *Squire*, *supra*, at 8, wisely recognized this concept:

> **The fact that this amendment antedated the federal income tax by 10 years also seems irrelevant**. The literal language of the proviso evinces a congressional intent . . . [Emphasis added]

Accordingly, Article III, Paragraph 1, of the Yakama Treaty establishes a "clearly expressed" exemption from travel taxes enacted following the execution of the Treaty. The Court of Appeals here devised a Treaty Federal tax exemption test far more narrow and stringent than is required or allowed by this Court. The opinion of the Court of Appeals conflicts directly with the opinions cited herein and therefore must be reviewed and reversed by this Court.

CONCLUSION

The Court of Appeals' opinion is in direct conflict with four opinions of this Court which have consistently applied the canons of construction to Article III of the Yakama Treaty in order to determine its meaning as the Yakamas understood it. The decision of the Court Appeals' failing to

construe the language of Article III, Paragraph 1, of the Yakama Treaty conflicts directly with the rulings of this Court in *Tulee*, *supra*, and *Passenger Fishing Vessel Ass'n*, *supra*, requiring such construction of Article III and determining that it reserved specific and meaningful rights to the Yakamas. Its determination that "express exemptive language" be present in a Treaty before the application of the canons can be applied to such language is both an oxymoron because the canons do not apply to construe "express" language, and in direct conflict with the tax decision of this Court requiring application of the canons to doubtful Treaty expressions, and then requiring only that the exemption be "clearly expressed."

Finally, the opinion below creates a test for Indian Federal tax exemptions that engenders an absurd result. It has been the law for 200 years that "doubtful" or "ambiguous" Treaty language shall be subject to interpretation favorable to Indians. Those canons are *not* applicable when Treaty language is express or obvious as to its meaning. *Worchester v. The State of Georgia*, 6 Pet. 515, 582. Here, the Court of Appeals started with the end point of the construction test – express language – and made it the beginning. A holding that a Court must first find "express" language before applying the canons provides no test for their application, as no "doubtful" expression can exist in "express" language. Such a determination has no place in our law, and the decision does significant harm to the decisions of this Court and those of the Court of Appeals for the Ninth Circuit.

Based upon the foregoing, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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April 22, 2003

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIP R. RAMSEY, dba Tiin-Ma Logging Co.; TIIN-MA LOGGING CO., *Plaintiffs-Appellees*, v. UNITED STATES OF AMERICA, *Defendant-Appellant.*	No. 01-35014 D.C. No. CV-99-03070-WFN OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Chief Judge, Presiding

Argued and Submitted
June 5, 2002 – Seattle, Washington

Filed September 11, 2002

Before: Melvin Brunetti, Stephen S. Trott, and
M. Margaret McKeown, Circuit Judges.

Opinion by Judge Trott

COUNSEL

David English Carmack, Department of Justice, Washington, D.C., for the defendant-appellant.

A. Wray Muoio, Department of Justice, Washington, D.C., for the defendant-appellant.

Kent L. Jones, Department of Justice, Washington, D.C., for the defendant-appellant.

Timothy Weaver, Weaver Law Office, Yakima, Washington, for the plaintiffs-appellees.

OPINION

TROTT, Circuit Judge:

OVERVIEW

The United States appeals the district court's grant of summary judgment in favor of Kip R. Ramsey ("Ramsey") awarding him a refund of federal heavy vehicle and diesel fuel taxes, penalties, and interest. The government argues that Ramsey's prior federal lawsuit challenging a similar Washington *state* tax is not controlling, and that the district court erred by deferring to it. We have jurisdiction pursuant to 28 U.S.C. § 1291. As in his prior suit, Ramsey claims that the 1855 Yakama[1] Treaty exempts him from all taxes burdening his use of the public roads. We agree that the Treaty is the relevant starting point, but we disagree with Ramsey's gloss on its interpretation. The federal standard requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed. Applying the federal standard to this case, we find no "express exemptive language" in the relevant Treaty provision. Thus, we reverse the district court's decision

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[1] Although the original treaty is entitled "Treaty with the Yakimas," Yakama Tribal Resolution T-053-94 recognized the official spelling as "YAKAMA." (Jan. 14, 1994). Therefore, we use "Yakama" throughout this opinion.

and remand for entry of summary judgment in favor of the United States.

BACKGROUND

Ramsey is a member of the federally recognized Yakama Indian Tribe ("Yakama"). He lives and works on the Yakama Reservation. He is the sole owner of Tiin-Ma Logging, which cuts timber only on the reservation. Ramsey hauls his lumber to off-reservation markets using diesel fuel trucks that exceed 55,000 pounds gross vehicle weight.

Section 4481 of the Internal Revenue Code, 26 U.S.C. § 4481[2] ("heavy vehicle tax"), requires that Ramsey pay a tax on his trucks that exceed 55,000 pounds. Section 4041[3] ("diesel fuel tax") mandates that Ramsey pay tax on diesel fuel. *See* 26 U.S.C. § 4041. For the period between 1986 and 1993, Ramsey was assessed and paid $460,702.55 in federal heavy vehicle and diesel fuel taxes, penalties, and interest.

Ramsey disputed the assessed taxes and requested a refund from the Internal Revenue Service ("IRS"), claiming the federal taxes were preempted by the Treaty with the Yakamas, June 9, 1855, 12 Stat. 951 (1859) ("Treaty"). In particular, Article III, paragraph 1, of the Treaty reads:

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[2] § 4481 imposes a $100 per year tax for 55,000 pound vehicles, plus $22 for each additional 1,000 pounds up to 75,000 pounds.

[3] § 4041 imposes a 15 cent per gallon tax on diesel fuel used in highway vehicles, but exempts vehicles engaged in "an off-highway business use."

> [I]f necessary for the public convenience, roads may be run throughout the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

12 Stat. at 952-53. Ramsey argued that the Treaty exempted the Yakama from paying fees to use the public highways, citing as authority his successful challenge to a similar, state-imposed, highway-related tax in *Yakama Indian Nation v. Flores,* 955 F. Supp. 1229 (E.D. Wash. 1997), which we affirmed in *Cree v. Flores,* 157 F.3d 762 (9th Cir. 1998) (*Cree II*). Unswayed, the IRS denied Ramsey's request for a refund.

Ramsey filed suit in district court to settle the refund dispute. On cross motions for summary judgment, the district court held, based on *Cree II,* that the Yakama were exempt from federal taxes for the use of public highways. The district court entered judgment in favor of Ramsey. The United States appealed.

DISCUSSION

A. Standard of Review

"We review de novo the interpretation and application of treaty language." *Cree II,* 157 F.3d at 768. A grant of summary judgment is also reviewed de novo. *Delta Sav. Bank v. United States,* 265 F.3d 1017, 1021 (9th Cir. 2001). We must determine, viewing the evidence in the light most favorable to the government, whether there are any genuine issues of material fact and whether the district

court correctly applied the relevant substantive law. *See id.*

B. Tax Exemption Analysis – Federal and State Standards

Ramsey argues that this case is controlled by *Cree II*'s exemption of the Yakama from state heavy vehicle taxes. In the alternative, Ramsey argues that the "in common with" language in the highway use provision of the Treaty creates an exemption from the federal heavy vehicle and diesel fuel taxes.

1. Application of Cree II

Ramsey's argument begins with *Cree v. Waterbury,* 873 F. Supp. 404 (E.D. Wash. 1994), in which several Yakama Indians who operated logging companies, including Ramsey, claimed that Article III of the Treaty precluded application of Washington's heavy vehicle tax to the Yakama. The district court agreed with the Yakama, but based its decision on the Supreme Court's construction of the "in common with" language in the Treaty's fishing rights provision without analyzing separately the "in common with" language in the highway use provision. *Waterbury,* 873 F. Supp. at 422-23 (citing *Tulee v. Washington,* 315 U.S. 681 (1942), and *United States v. Winans,* 198 U.S. 371 (1905)).

On appeal, this Court concluded that "[s]tate tax laws applied to Indians outside of Indian country, such as those at issue here, are presumed valid 'absent express federal law to the contrary.'" *Cree v. Waterbury,* 78 F.3d 1400, 1403 (9th Cir. 1996) (*Cree I*) (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973)). We remanded

the case and instructed the district court to "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Cree I,* 78 F.3d at 1405. The district court was to determine if the Treaty prohibited state heavy vehicle taxation of the Yakama based on the Treaty's language and the parties' intent when they signed the Treaty.

On remand, the district court considered extrinsic evidence of the Yakama's understanding of the treaty and found that the Treaty, as understood by the Yakama, "unambiguously reserve[d] to the Yakamas the right to travel the public highways without restriction for purposes of hauling goods to market." *Flores,* 955 F. Supp. at 1248. In the alternative, the district court found that even if the Yakama's right to travel was not so unambiguously expressed in the Treaty, the Indian-friendly canons of construction required that it should be read in the Yakama's favor. *Id.* at 1249. We affirmed on these latter grounds in large part because the state offered no evidence to suggest that the parties to the Treaty intended to limit the Yakama's broad reading of this right. *Cree II,* 157 F.3d at 771.

In this case, the United States agrees that if *Cree II*'s interpretation of the Treaty is equally applicable to both state and federal taxes, Ramsey would be exempt from federal road use taxes. The government argues, however, that the *Cree II* analysis is inapplicable to federal taxes because there is a different standard for exemptions from federal taxation. We agree.

In fact, this Court recognized a distinction between the standard for state tax exemptions and federal tax exemptions in *Cree I:*

> The State argues that the fees "implement federal highway financing policy," and that consequently the fees are valid unless the Treaty creates a "definitely expressed" exemption. *The State presents no authority for this court to find that the state-imposed truck fees should be judged according to the standard for federal fees.*

78 F.3d at 1403 n.4 (emphasis added) (citation omitted). The different standards stem from the state and federal government's distinct relationships with Indian tribes. The federal government has plenary and exclusive power to deal with tribes. *Bryan v. Itasca County,* 426 U.S. 373, 376 n.2 (1976). "The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1975). States, on the other hand, interact with the tribes in a more limited capacity. A state's regulatory authority over tribal members is limited by the tribal right of self-government and the preemptive effect of federal law. *Id.* at 141-142. For this reason, all citizens, including Indians, are subject to federal taxation unless expressly exempted, *Hoptowit v. Commissioner,* 709 F.2d 564, 566 (9th Cir. 1983) (citing *Squire v. Capoeman,* 351 U.S. 1, 6 (1956)), while a state's authority to tax tribal members is limited depending on the subject and location of the tax, *see McClanahan v. State Tax Comm'n,* 411 U.S. 164, 170-71 (1973) (holding that state taxes are not applicable to Indians on reservations absent congressional consent); *Mescalero,* 411 U.S. at 148-49 ("Absent express federal law to the contrary, Indians going beyond reservation

boundaries have generally been held subject to nondiscriminatory State law[s].").

The applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty. The language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation. Treaty language such as "free from incumbrance," "free from taxation," and "free from fees," are but some examples of express exemptive language required to find Indians exempt from federal tax.

Only if express exemptive language is found in the text of the statute or treaty should the court determine if the exemption applies to the tax at issue. At that point, any ambiguities as to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians. In *Karmun v. Commissioner,* 749 F.2d 567, 569 (9th Cir. 1984), we noted that "[n]otwithstanding the canon of interpretation that resolves ambiguities in statutes and treaties in favor of Indians, we have recognized that the intent to exempt income of Indians from taxation must be clearly expressed." In addition, we stated that "[p]olicy considerations by themselves are insufficient to justify the implication of a tax exemption absent express exemptive language." *Id. Confederated Tribes of Warm Springs Reservation v. Kurtz,* 691 F.2d 878, 881 (9th Cir. 1982) (noting that the intent to exempt must be definitely expressed before the court can construe the statute or treaty to create an exemption), *United States v. Anderson,* 625 F.2d 910, 913 (9th Cir. 1980) (noting that the canon of construction reading statutes and treaties in favor of the Indians does not come into play absent express

exemptive language). Therefore, when reviewing a claim for a federal tax exemption, we do not engage the canon of construction favoring the Indians unless express exemptive language is first found in the text of the statute or treaty. Only if such language exists, do we consider whether it could be "reasonably construed" to support the claimed exemption. *See Hoptowit,* 709 F.2d at 566 (concluding that treaty language setting apart tribal lands "for the exclusive use and benefit" of the tribe could not be construed to support an exemption from federal income tax).

When a court interprets a state's taxation of Indians' off-reservation activities, the court determines if there is an express federal law prohibiting the tax. The federal law must be interpreted in the light most favorable to the Indians, and extrinsic evidence may be used to show the federal government's and Indians' intent. Unlike the federal standard, there is no requirement to find express exemptive language *before* employing the canon of construction favoring Indians.

In *Cree II* this Court implemented the Indian-friendly canon of construction and analyzed the history of the Treaty and the understanding of the Yakama to find an "express federal law" which exempted the Yakama from state taxation. *Cree II,* 157 F.3d at 769. We held that the Yakama Treaty should be interpreted "to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use." *Id.* Ramsey argues that *Cree II*'s Treaty interpretation, finding an "express federal law" exempting the Yakama from state heavy vehicle taxes, controls this case when looking for "express exemptive language" to exempt the

Yakama from similar federal taxation. *Cree II*'s interpretation, however, is not binding on the question of *federal* taxation because the initial inquiry when exempting Indians from *federal* taxes is whether the federal law in question contains express exemptive language at all. The canon of construction favoring the Indian when ambiguities are present in a statute or treaty does not come into play absent such language. We are not persuaded that the Supreme Court's recent reference in *Chickasaw Nation v. United States,* 122 S. Ct. 528, 535-36 (2001), to potential differences between the application of the Indian-friendly canons to congressional statutes and to Indian treaties has changed our long standing precedent in the treaty context which has already resolved any conflicts between those canons and the express exemption requirement. *See, e.g., Squire,* 351 U.S. at 6; *Confederated Tribes,* 691 F.2d at 881. Thus, *Cree II*'s analysis of the same Treaty provision utilizing extrinsic evidence and interpreting the provision most favorably to the Yakama does not control our analysis.

2. Application of the Federal Standard

Applying the federal standard, we hold that the relevant Treaty provision contains no "express exemptive language." The Treaty simply states that "free access from the [reservation] to the nearest public highway, is secured to [the Yakama]; as also the right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at 953. This provision does not provide express language from which we can discern an intent to exempt the Yakama from federal heavy vehicle and diesel fuel taxation. The only exemptive language in the Treaty is the "free access" language. "Free access," however, does not

modify the right to travel upon the public roadways. Indeed, the clause granting the Yakama the "right, in common with citizens of the United States, to travel upon all public highways" contains no exemptive language. "In common with" does not express an intent to exempt the Yakama from taxes. Thus, there is no express exemptive language in the Treaty to exempt the Yakama from the generally applicable, federal heavy vehicle and diesel fuel taxes. Absent any express exemptive language to the contrary, the taxes at issue apply to the Yakama, and the district court's judgment in favor of Ramsey must be reversed and summary judgment entered in favor of the United States.

CONCLUSION

Ramsey's prior federal case, analyzing a state's heavy vehicle tax and the Yakama Treaty, is not binding in this lawsuit dealing with a similar federal tax. When the Treaty is analyzed under the federal standard, there is no express language exempting the Yakama from the heavy vehicle and diesel fuel taxes, nor can we find any broader exemptive language that could be reasonably construed as encompassing such an exemption. Thus, we remand for entry of summary judgment in favor of the United States.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KIP R. RAMSEY, d/b/a Tiin-Ma Logging Co., Plaintiff, -vs- UNITED STATES OF AMERICA, Defendant.	NO. CY-99-3070-WFN ORDER (Filed Nov. 02, 2000)

On October 30, 2000, the Court heard oral arguments on both Plaintiff's and Defendant's Motion for Summary Judgment. Timothy Weaver represented the Plaintiff; W. Carl Hankla represented Defendant. The Court has reviewed the Motions and briefing, has considered the oral arguments, and is fully informed. For the reasons stated below, the Court grants Plaintiff's Motion for Summary Judgment and denies Defendant's Motion.

I. BACKGROUND

Plaintiff lives in White Swan, Washington, and owns Tiin-Ma Logging Company, a sole proprietorship. Plaintiff filed this action seeking a refund of federal excise taxes, penalties, and interest based on heavy vehicle use taxes paid pursuant to 26 U.S.C. § 4481 and diesel fuel excise taxes paid pursuant to 26 U.S.C. § 4041. An 1855 Treaty between the United States Government and the Yakama Indians provides Plaintiff's basis for seeking this refund of federal taxes. Plaintiff successfully challenged the similar highway-related taxes imposed by the state of Washington.

Yakama Indian Nation v. Flores, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores,* 157 F.3d 762 (9th Cir. 1998). Defendant argues that the Court in the instant case must apply a different, more stringent standard for determining whether the Treaty exempts Plaintiff from the federal taxes at issue.

Plaintiff on September 15, 2000, filed a Motion for Summary Judgment; on the same date, Defendant also filed a Motion for Summary Judgment. Both parties agree this case should be decided as a matter of law.

II. FACTS

The following facts can be found in the parties' statements of material facts (Ct. Recs. 14 and 20), submitted pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1. The Court deems admitted any material fact stated by a moving party and not rebutted by a non-moving party. LOCAL RULE 56.1(d).

Plaintiff's Logging Business on the Yakama Reservation. Plaintiff is an enrolled member of the Yakama Indian Tribe who conducts a logging business involving tribal resources on the Yakama Reservation. Plaintiff hauls timber cut on tribal land to off-Reservation mill sites, using trucks that run on diesel fuel, exceed 55,000 pounds gross vehicle weight, and travel on public highways. The logs are "tribal goods," as Judge McDonald and the Ninth Circuit used that term in Plaintiff's prior case challenging state taxes and fees.

Plaintiff's Payment of Federal Excise Taxes. Under the Internal Revenue Code, 26 U.S.C. § 4481, Plaintiff has been required to pay federal tax on the use of

any trucks exceeding a gross vehicle weight of 55,000 pounds. Under 26 U.S.C. § 4041, Plaintiff also must pay federal tax on the diesel fuel used by his trucks. Failure to pay such taxes could subject Plaintiff to monetary penalties, prosecution, or impoundment of his trucks. Between 1986 and 1993, Plaintiff paid $460,702.55 in federal excise taxes, penalties, and interest under 26 U.S.C. § 4481 and § 4041. Plaintiff now seeks a refund for that amount plus interest.

1855 Yakama Treaty. Article III, paragraph 1 of the 1855 Treaty between the United States Government and the Yakamas provides as follows:

> And provided, That, if necessary for the public convenience, (953) roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

12 Stat. 951, 953 (1855). Several other passages from the Treaty recognize the Yakamas' right to travel on roads outside the Reservation and take goods to market. In the mid-1800s, the Yakamas communicated regularly with the Puget Sound tribes and routinely traveled to trade with neighboring Indians and to hunt buffalo. During the Treaty negotiations between the United States Government and the Yakamas, the parties never discussed the possibility that the Yakamas' right to access public highways could be conditioned upon payment of any fees or taxes. The Yakamas in 1855 highly valued their continued free access to travel throughout the region; the Yakama Chiefs who signed the Treaty placed great importance on

preserving that right. The primary Government representatives in the Treaty negotiations, Governor Isaac Stevens and General Joel Palmer, recognized the Yakamas' desire and need to travel freely.

III. STANDARD OF REVIEW

Summary Judgment Standard. The purpose of summary judgment is to avoid unnecessary trials when no dispute exists over the facts before the Court. *Zweig v. Hearst Corp.,* 521 F.2d 1129 (9th Cir. 1975). A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that no genuine issue of material fact exists and that the party is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.,* 677 F.2d 1301, 1306 (9th Cir. 1982). The Court must construe all facts and all justifiable inferences in favor of the non-moving party. *Anderson,* 477 U.S. at 255.

The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex,* 477 U.S. at 324; *Marks v. United States,* 578 F.2d 261, 263 (9th Cir. 1978). The non-moving party may use affidavits, depositions, answers to interrogatories, and admissions to do this. *Celotex,* 477 U.S. at 323-24. A court must enter summary judgment against a party who fails to make a showing sufficient to establish an essential element of a claim, even

if genuine factual disputes exist regarding other elements of the claim. *Id.* at 322-23. No issue for trial exists "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson,* 477 U.S. at 249. Thus, "a scintilla of evidence" in support of the non-moving party's position will not suffice. *Id.* at 252.

IV. DISCUSSION

Federal Taxes Generally Applicably **[sic]** ***to Indians.*** Both Plaintiff and Defendant agree that the central issue in this case is whether the 1855 Treaty between the Yakama Indian Tribe and the United States Government exempts Plaintiff from federal excise taxes. As a general rule, federal taxes apply to Indian tribes and their members unless an exemption can be found in the language of a treaty or federal statute. *Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz,* 691 F.2d 878, 881 (9th Cir. 1982); *United States v. Anderson,* 625 F.2d 910, 913 (9th Cir. 1980). Such an exemption must be definitely expressed where the general language of the tax statute is broad enough to include the subject matter. *Id.* at 913; *Choteau v. Burnet,* 283 U.S. 691, 693-94 (1931). For example, in *Choteau,* the Supreme Court found that a statute taxing the income of "every individual" did include Indians since the Court found no intent to exclude the Indians in the tax statute, a treaty, or any federal law. 283 U.S. at 693-94.

Standard for Determining Federal Tax Exemptions. While Plaintiff and Defendant agree that federal taxes apply to Indians in lieu of treaty or statutory language granting an exemption, the parties disagree on the

appropriate standard the Court should apply in determining whether the Treaty contains such an exemption. Both parties acknowledge that the Ninth Circuit looks for "express exemptive language" in a treaty or federal statute before finding an exemption to a generally applicable federal tax. *United States v. Anderson,* 625 F.2d 910, 913 (9th Cir. 1980). However, Plaintiff argues that the Court may examine extrinsic evidence showing how the Indians interpreted the Treaty at the time it was signed. Defendant, on the other hand, argues that if the Treaty does not include language specifically referring to taxation or encumbrances, then the Court may proceed no further in determining whether a federal tax exemption exists and must find for the Government.

Plaintiff urges the Court to follow the precedent set in *Yakama Indian Nation v. Flores,* 955 F. Supp. 1229 (E.D.Wash.1997), *aff'd sub nom. Cree v. Flores,* 157 F.3d 762 (9th Cir. 1998), a case initiated by the same Plaintiff as the instant case and based on the same facts now before the Court. In that case, Plaintiff claimed that Washington state's truck license and permit fees violated his rights under the Yakama Treaty. Plaintiff prevailed on his claim after the district court conducted a factual investigation into the historical context and intent of the parties to the Treaty. 955 F. Supp. 1229. The Ninth Circuit affirmed the district court's finding that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use." 157 F.3d at 769. Plaintiff argues that the Court must follow that precedent here.

Defendant, on the other hand, asserts that a different, more stringent standard applies to challenges of federal taxes, not the standard in *Cree.* Defendant argues that the

Treaty must on its face contain "express exemptive language" before the Court may proceed to examine any extrinsic evidence. For support, Defendant cites cases evaluating state taxes and fees in light of Indian treaties. In *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, (1980), for example, the Court held that the pervasive federal regulatory scheme over timber operations on the Apache Reservation precluded the state of Arizona from assessing excise taxes, even though no "express congressional statement" indicated that Congress intended to preempt the state taxes. 448 U.S. at 151. Defendant also cites *Confederated Tribes of Warm Springs v. Kurtz,* 691 F.2d 878 (9th Cir. 1982), which recognized that while the Supreme Court's preemption analysis in *White Mountain* did not require an express statement, "to imply an exemption from federal taxes . . . we must find 'express exemptive language' in a statute or treaty." 691 F.2d at 882. Defendant also points to a footnote in an earlier Ninth Circuit opinion in *Cree v. Waterbury,* 78 F.3d 1400 (9th Cir. 1996), in which the court seems to hint that the standard for finding exemptions to federal fees might be different than that for finding exemptions to state fees. ("The State presents no authority for this court to find that the state-imposed truck fees should be judged according to the standard for federal fees." 78 F.3d at 1402, n.4.)

Defendant misinterprets the case law, however. The less stringent standard to which Defendant refers generally applies only to state taxes imposed on reservations, inside "Indian country." The *White Mountain* and *Cree* cases say just that: "In the case of 'Indians going *beyond* reservation boundaries, . . . a nondiscriminatory state law' is generally applicable in the absence of 'express federal law to the contrary.'" *White Mountain,* 448 U.S. at 144,

n.11, *quoting Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973) (emphasis added). In *Yakama Indian Nation,* the Ninth Circuit also recognized this standard. "State tax laws applied to Indians outside of Indian country, such as those at issue here, are presumed valid 'absent *express* federal law to the contrary.'" 78 F.3d at 1403 (emphasis added). While Defendant desperately attempts to distinguish the test used in *Cree* from that required in the case now before the Court, Defendant's argument fails. The court in *Cree* did in fact apply the standard requiring "express" language – the same standard to be applied here – in order to find a tax exemption. Furthermore, while the Ninth Circuit will not *create* a tax exemption without such language, the Circuit also has not required treaty language explicitly to reference a federal tax exemption before finding one. Defendant attempts to distinguish the Ninth Circuit's standard from other circuits, such as the federal circuit, which apply a test permitting exemptions to be implied where a treaty's language can reasonably be construed as conferring such an exemption. In fact, the Ninth Circuit routinely uses the term "express exemptive language" interchangeably with the phrase "language which can reasonably be construed to confer an exemption." *Karmun v. Commissioner,* 749 F.2d 567, 570 (9th Cir. 1984). *See also, e.g., Dillon v. United States,* 792 F.2d 849, 853 (9th Cir. 1986); *Hoptowit v. Commissioner,* 709 F.2d 564, 565 (9th Cir. 1983); *Anderson,* 625 F.2d 910, 913. The case law contradicts Defendant's assertion that the Ninth Circuit's requirement of "express exemptive language" provides a bright line rule that includes only language which unambiguously provides an exemption.

For example, in *Hoptowit,* the plaintiff challenged his income tax assessment on per diem payments for his work as a tribal council member. 709 F.2d at 565. The court interpreted the 1855 Treaty with the Yakamas – the same treaty at issue in this case – and looked specifically at a clause guaranteeing "exclusive use and benefit" of the reservation land for the Yakamas. *Id.* at 566. While the court denied the plaintiff's claim that this clause should exempt him from tax on income derived from services he provided, the court also noted in dicta that such clause presumably *would* exempt income derived directly from the land. *Id.* Even though the generally worded Treaty language mentioned nothing of taxes or exemptions specifically, the Ninth Circuit recognized that such language still could be sufficient to find a tax exemption.

Similarly, in *Kirschling v. United States,* 746 F.2d 512 (9th Cir. 1984), the Ninth Circuit did not limit its inquiry to a literal interpretation of the statutory language at issue. The court found that an Indian's gift to a non-Indian of the proceeds from timber lands was not subject to federal gift tax. 746 F.2d at 513. In finding this tax exemption, the court interpreted the General Allotment Act of 1887, which provided that the United States would hold allotted land in trust for Indians for a certain period of years until the Government issued such land in fee simple to the Indians. The Act and its amendments provided that after such fee was issued, all restrictions on the sale, encumbrance, or taxation of the land should be removed. *Id.* at 514. Even though the issue in *Kirschling* centered on proceeds from land not yet issued in fee simple, the court interpreted the statute in favor of the Indian and found that a tax exemption would be consistent with the purpose of the Act and should be granted. *Id.* at 514-15.

These Ninth Circuit cases follow *Squire v. Capoeman,* 351 U.S. 1 (1956), a landmark Indian tax exemption case in which the Supreme Court interpreted treaty and statutory language to determine whether the proceeds of a timber sale on allotted reservation lands were subject to the federal capital gains tax. 351 U.S. at 2. The Court noted that tax exemptions should be clearly expressed, and then examined the underlying purpose of the General Allotment Act, as well as subsequently passed legislation; based on its interpretation of those things, the Court construed the Act in favor of the plaintiff Indians. The Court held that even though the Act's challenged provision was not "expressly couched" in terms of non-taxability, it nonetheless was sufficient to confer a tax exemption. *Id.* at 5.

Courts, even when applying the requirement of "express exemptive language," routinely construe treaty language according to canons of Indian law interpretation and find tax exemptions. If, as Defendant argues, the rule in fact were a bright line requiring unambiguous language granting an exemption, then the many cases holding that ambiguities should be construed in favor of Indians would be meaningless. The Court, therefore, rejects Defendant's argument that the *Cree v. Flores* case should not be relied on here.

Meaning of the Yakama Treaty. This Court need not undertake the effort of construing Article III of the Yakama Treaty because clear case law, based on the very facts now before the Court, already has established the proper interpretation of the specific Treaty provision at issue here. In *Yakama Indian Nation v. Flores,* 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v.*

Flores, 157 F.3d 762 (9th Cir. 1998), the court made the following finding:

> Article III, paragraph 1, of the Treaty With the Yakamas, when viewed in its historical context, unambiguously reserves to the Yakamas the right to travel the public highways without restriction. . . . Article III, paragraph 1 of the Treaty provides the Yakama Indian Nation with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.

955 F. Supp. at 1262. While the claim before the court in *Cree* challenged only state fees and taxes, neither the district court nor the Ninth Circuit made any effort to limit the Treaty interpretation to apply only to a claim for a state tax exemption. In fact, as discussed above, the court applied the same test, requiring a finding of "express" language, that applies here. Furthermore, although the court did not directly address federal taxes, the court seemingly was aware of the potential application to federal taxes. The court referenced federal fees in its finding that "[a]t the time of the Treaty the United States did not charge fees for travel on its public highways in the Washington Territory." *Id.* at 1263. All evidence supports the conclusion that the district court and Ninth Circuit's interpretation of the Treaty should apply here.

Abrogation of Treaty Rights. In the alternative, Defendant argues that even if the Treaty did exempt the Yakamas from excise taxes, Congress has abrogated any such exemption. To support this argument, Defendant cites a tax code not at issue in this case. Defendant concedes that the tax statutes being challenged by Plaintiff –

26 U.S.C. §§ 4041(1)(a) and 4481(1) – show no evidence of abrogating treaty rights; in fact, those statutes fail even to mention Indians. Defendant instead argues that another statute granting certain tax exemptions to Indian tribal governments – Internal Revenue Code § 7871 – implicitly abrogates the Treaty rights Plaintiff asserts here. Defendant's argument, however, goes against clear precedent that abrogation of Treaty rights must be done clearly and explicitly.

The intent to abrogate or modify an Indian treaty "is not to be lightly imputed to the Congress." *Menominee v. United States,* 391 U.S. 404, 413, *quoting Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Ltd.,* 291 U.S. 138, 160 (1934). In fact, Congress' intention to abrogate rights under an Indian treaty must be "clear and plain." *United States v. Dion,* 476 U.S. 734 (1986). Congress must have "actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740. In *Dion,* the Supreme Court held that the Eagle Protection Act abrogated Indian treaty rights to hunt eagles. The Court based its conclusion on specific language in the Act that allowed the Secretary of the Interior to grant exceptions for Indian tribes' religious purposes, as well as legislative history showing that Congress specifically considered Indian ceremonies and customs related to eagles.

Defendant cites *Washington v. Confederated Tribes & Bands of the Yakima Indian Nation,* 439 U.S. 463 (1979), to support the argument that Congress need not show a specific intent to abrogate. However, in *Confederated Tribes,* the Supreme Court examined a jurisdictional law of general applicability to Indian country, which by its

nature applied to Indian tribes. Section 7871, which Defendant claims has abrogated the Yakama Treaty rights raised by Plaintiff, does apply to tribal governments but fails to address the type of activity for which Plaintiff, an individual Indian, seeks an exemption. In *United States v. Farris,* 624 F.2d 890 (9th Cir. 1980), also cited by Defendant, the court recognized the presumption that Congress does not intend to abrogate treaty rights when it passes general laws unless it makes specific reference to a treaty or Indians. 624 F.2d at 893.

While Congress did reference Indian tribal governments in 26 U.S.C. § 7871, it did not discuss excise taxes as applied to tribal members, and it failed to mention Indians at all in the general tax laws Plaintiff challenges here. Furthermore, as Plaintiff points out, the legislative history behind § 7871 shows an intent to benefit, not harm, Indian tribes. S. Rep. No. 97-646 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4580. Therefore, the Court rejects Defendant's argument that the Yakamas' Treaty rights have been abrogated.

V. CONCLUSION

While federal tax laws generally apply to Indians and other citizens alike, Plaintiff here relies on express language in the Yakama Treaty to support his position that under that Treaty, he should be exempt from federal taxes that burden his use of public highways to take tribal goods to market. The Court is bound by the district court and Ninth Circuit's interpretation of the Treaty in *Cree v. Flores,* and believes that the same standard applied in that case should apply here. Furthermore, because Defendant fails to present sufficient evidence that Congress

abrogated the Treaty rights at issue here, the Court finds that Plaintiff's rights under the Yakama Treaty exempt him from paying taxes imposed by 26 U.S.C. §§ 4481 and 4041 as a prerequisite to using public highways to take tribal goods to market.

Accordingly,

IT IS ORDERED that:

1. Plaintiff's Motion for Summary Judgment filed September 15, 2000, **Ct. Rec. 12**, is **GRANTED**.

2. The District Court Executive is directed to **ENTER JUDGMENT in favor of Plaintiff in the amount of $460,702.55**.

3. Defendant's Motion for Summary Judgment filed September 15, 2000, **Ct. Rec. 18**, is **DENIED**.

The District Court Executive is directed to file this Order and provide copies of this Order and the Judgment to counsel and to **CLOSE THIS FILE**.

DATED this 2 day of November, 2000.

/s/ William Nielsen
WM. FREMMING NIELSEN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KIP R. RAMSEY, d/b/a Tiin-Ma Logging Co., Plaintiff(s), vs. UNITED STATES OF AMERICA, Defendant(s).	No. CY [sic]-99-3070-WFN **JUDGMENT IN A CIVIL CASE** (Filed Nov. 2, 2000)

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment filed September 15, 2000 [Ct.Rec.12] is GRANTED, and judgment is entered in favor of the Plaintiff in the amount of $460,702.55.

Defendant's Motion for Summary Judgment filed September 15, 2000 [Ct.Rec.18] is DENIED.

DATED: November 2, 2000 JAMES R. LARSEN,
CLERK

by /s/ Linda Emerson
Linda Emerson,
Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER AREA CODE 202
CLERK OF THE COURT 479-3011

March 17, 2003

Mr. Tim Weaver
402 Yakima Avenue
Suite 190
Yakima, WA 98907

Re: Kip Ramsey, dba Tiin-Ma Logging Company
v. United States
Application No. 02A772

Dear Mr. Weaver:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on March 17, 2003, extended the time to and including April 22, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Sandra Elliott Spagnolo
Assistant Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIP R. RAMSEY, dba Tiin-Ma Loggin [sic] Co.; TIIN-MA LOGGIN [sic] CO, Plaintiffs-Appellees, v. UNITED STATES OF AMERICA, Defendant-Appellant.	No. 01-35014 D.C. No. CV-99-03070-WFN Eastern District of Washington, Spokane ORDER (Filed Dec. 23, 2002)

Before: BRUNETTI, TROTT and McKEOWN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Trott and McKeown have voted to deny the petition for rehearing en banc, and Judge Brunetti so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX F

INTERNAL REVENUE CODE (26 U.S.C.):

SECTION 4041. IMPOSITION OF TAX. (As amended and effective through March 31, 1988):

(a) DIESEL FUEL AND SPECIAL MOTOR FUELS.

(1) DIESEL FUEL. – There is hereby imposed a tax of 15 cents a gallon on any liquid (other than any product taxable under section 4081) –

(A) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle for use as a fuel in such vehicle, or

(B) used by any person as a fuel in a diesel-powered highway vehicle unless there was a taxable sale of such liquid under subparagraph (A).

* * *

SECTION 4081. IMPOSITION OF TAX. (As amended and effective through December 31, 1995):

(a) TAX IMPOSED. –

(1) TAX ON REMOVAL, ENTRY, OR SALE. –

(A) IN GENERAL. – There is hereby imposed a tax at the rate specified in paragraph (2) on –

(i) the removal of a taxable fuel from any refinery,

(ii) the removal of a taxable fuel from any terminal,

(iii) the entry into the United States of any taxable fuel for consumption, use, or warehousing, and

(iv) the sale of a taxable fuel to any person who is not registered under section 4101 unless there was a prior taxable removal or entry of such fuel under clause (i), (ii), or (iii).

* * *

(2) RATES OF TAX. –

(A) IN GENERAL. – The rate of the tax imposed by this section is –

(i) in the case of gasoline, 18.3 cents per gallon, and

(ii) in the case of diesel fuel, 24.3 cents per gallon.

(B) LEAKING UNDERGROUND STORAGE TANK TRUST FUND TAX. – The rates of tax specified in subparagraph (A) shall each be increased by 0.1 cent per gallon. The increase in tax under this subparagraph shall in this title be referred to as the Leaking Underground Storage Tank Trust Fund financing rate.

* * *

SECTION 4083. DEFINITIONS; SPECIAL RULE; ADMINISTRATIVE AUTHORITY. (As amended and effective through December 31, 1995):

(a) TAXABLE FUEL. – For purposes of this subpart –

(1) In general. – The term "taxable fuel" means –

(A) gasoline, and

(B) diesel fuel.

* * *

(3) DIESEL FUEL. – The term "diesel fuel" means any liquid (other than gasoline) which is suitable for use as a fuel in a diesel-powered highway vehicle, a diesel-powered train, or a diesel-powered boat.

(b) CERTAIN USES DEFINED AS REMOVAL. – If any person uses taxable fuel (other than in the production of gasoline, diesel fuel, or special fuels referred to in section 4041), such use shall for the purposes of this chapter be considered a removal.

* * *

SECTION 4091. IMPOSITION OF TAX. (As amended and effective through December 31, 1993):

(a) IN GENERAL. – There is hereby imposed a tax on the sale of any taxable fuel by the producer or the importer thereof or by any producer of a taxable fuel.

(b) RATE OF TAX. –

(1) IN GENERAL. – The rate of the tax imposed by subsection (a) shall be the sum of –

(A)(i) the Highway Trust Fund financing rate and the diesel fuel deficit reduction rate in the case of diesel fuel, and

* * *

(2) HIGHWAY TRUST FUND FINANCING RATE. – For purposes of paragraph (1), except as provided in subsection (c), the Highway Trust Fund financing rate is 17.5 cents per gallon.

* * *

(4) DIESEL FUEL DEFICIT REDUCTION RATE. – for purposes of paragraph (1), except as provided in subsection (c), the diesel fuel deficit reduction rate is 2.5 cents per gallon.

* * *

SECTION 4092. DEFINITIONS. (As amended and effective through December 31, 1993):

(a) TAXABLE FUEL. – For purposes of this subpart –

(1) IN GENERAL. – The term "taxable fuel" means –

(A) diesel fuel, and

(B) aviation fuel.

(2) DIESEL FUEL. – The term "diesel fuel" means any liquid (other than any product taxable under section 4081) which is suitable for use as a fuel in a diesel-powered highway vehicle or a diesel-powered train.

* * *

(b) PRODUCER. – For purposes of this subpart –

(1) CERTAIN PERSONS TREATED AS PRODUCERS. –

(A) IN GENERAL. – The term "producer" includes any person described in subparagraph (B) who elects to register under section 4101 with respect to the tax imposed by section 4091.

(B) PERSONS DESCRIBED. – A person is described in this subparagraph if such person is –

(i) a refiner, compounder, blender, or wholesale distributor of a taxable fuel, or

(ii) a dealer selling any taxable fuel exclusively to producers of such taxable fuel, or

(iii) a retailer selling diesel fuel exclusively to purchasers as supplies for commercial and noncommercial vessels.

To the extent provided in regulations, a retailer shall not be treated as not described in clause (iii) by reason of selling de minimis amounts of diesel fuel other than as supplies for commercial and noncommercial vessels.

(C) TAX-FREE PURCHASERS TREATED AS PRODUCERS. – Any person to whom any taxable fuel is sold tax-free under this subpart shall be treated as the producer of such fuel.

(2) WHOLESALE DISTRIBUTOR. – For purposes of paragraph (1), the term "wholesale distributor" includes any person who sells a taxable fuel to producers, retailers, or to users who purchase in bulk quantities and deliver into bulk storage tanks. Such term does not include any person who (excluding the term "wholesale distributor" from paragraph (1)) is a producer or importer.

SECTION 4481. IMPOSITION OF TAX. (As amended and effective through December 31, 1995):

(a) Imposition of tax. – A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection

with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of at least 55,000 pounds at the rate specified in the following table:

Taxable gross weight:	**Rate of tax**:
At least 55,000 pounds, but not over 75,000 pounds.	$100 per year plus $22 for each 1,000 pounds (or fraction thereof) in excess of 55,000 pounds.
Over 75,000 pounds	$550.

(b) BY WHOM PAID. – The tax imposed by this section shall be paid by the person in whose name the highway motor vehicle is, or is required to be, registered under the law of the State or contiguous foreign country in which such vehicle is, or is required to be, registered, or, in case the highway motor vehicle is owned by the United States, by the agency or instrumentality of the United States operating such vehicle.

* * *

APPENDIX G

TREATY WITH THE YAKIMA, 1855.

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-path, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

ARTICLE 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along main ridge of the Cascade Mountains to the point where the nothern [sic] tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119° 10',) which two latter lines

separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Percé tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of the Attahnam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to

the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided. That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby

ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3. *And provided.* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this

treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying then with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one

gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salarly [sic] to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakima Nation, and is recognized as such by them and by the commissioners on the part of the United states holding this treaty; and all

the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 7. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defence [sic], but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. *And provided.* That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent. [L. S.]

Kamaiakun, his x mark. [L.S.]
Skloom, his x mark. [L.S.]
Owhi, his x mark. [L.S.]
Te-cole-kun, his x mark. [L.S.]
La-hoom, his x mark. [L.S.]
Me-ni-nock, his x mark. [L.S.]
Elit Palmer, his x mark. [L.S.]
Wish-och-kmpits, his x mark. [L.S.]
Koo-lat-toose, his x mark. [L.S.]
Shee-ah-cotte, his x mark. [L.S.]
Tuck-quille, his x mark. [L.S.]
Ka-loo-as, his x mark. [L.S.]
Scha-noo-a, his x mark. [L.S.]
Sla-kish, his x mark. [L.S.]

Signed and sealed in the presence of –

James Doty, secretary of treaties,
Mie. Cles. Pandosy, O. M. T.,
Wm. C. McKay,
W. H. Tappan, sub Indian agent, W. T.,
C. Chirouse, O. M. T.,
Patrick McKenzie, interpreter,
A. D. Pamburn, interpreter,
Joel Palmer, superintendent Indian affairs, O. T.,
W. D. Biglow,
A. D. Pamburn, interpreter.

Isaac J. Stevens

[Picture Omitted In Printing]

Official Proceedings

A True copy of the Record
of the Official Proceedings at the Council
in the Walla Walla Valley held jointly by
Isaac I. Stevens Gov. & Supt. W.T.
and
Joel Palmer Supt. Ind. Affairs O.T.
on the part of the United States
with the
Tribes of Indians named in the Treaties
made at that Council
June 9th and 11th
1855

The Yakama Reservation to extend from the Attannan River, to include the valley of the Pisco River and from the Yakama River to the Cascade Mountains. On this reservation we wish to place the Colville, O-kin-a-kunes, Palouse, Pesquoose, Klit-a-tats, and the bands on the north side of the river below the Walla Wallas as far as the Kathlapoodle River, near the Cowlitz, all these as well as the Yakamas on that reservation.

There is a third reservation east of Mt. Jefferson's which will be explained to you by Gen'l Palmer. There it is proposed to place the bands below the Umatillas.

We want you to think about this and see if you like it. You may think the reservations are not good. If not, you

will say so. The Cayuses, the Walla Wallas, the Umatillas may prefer the Yakama to the Nes Perses Reservation, and they may not like either.

I will give you briefly the reason for selecting these two reservations. We think they are large enough to furnish each man and each family with a farm, and grazing for all your animals. There is especially in winter grazing on both reservations. There is plenty of Salmon on these Reservations, there are roots and berries, there is also some game. You will be near the great road and can take your horses and your cattle down the river and to the Sound to market.

Though near to the great roads, you are a little of [sic off] from them, and you will not be liable to be troubled by travellers passing through.

We can better protect you from bad white men there, we can better prevent the trader and the preacher all in one man going there. We can better prevent bad men telling you to dance, and cheating you with lies. We can better stop the theif [sic] who comes to steal your horses. Your horses will be saved to you and there will be no thieves to throw into hell-fire.

You may ask, why so many tribes on one reservation, and how is it proper to place them on the reservation?

We want as many tribes together as can be taken care of by one agent. We can do more with the same means. This is a matter I wish to explain fully and also about the payment in clothing etc. which I mentioned in the first part of what I said. I will speak no more to day, but speak tomorrow. Think over what I have said and hear the rest tomorrow.

Gen'l Palmer said: I shall say nothing to you to night. You have been sitting a long time and you are tired. We want you to come tomorrow morning early. We want you all to come. You have heard [sic] but part; we want you to hear the whole. And when you hear all I think you will say It is good.

I have nothing more to say tonight.

The council then adjourned at 6 p.m.

June 5th Tuesday

The Indians began to collect at 11 1/2 a.m. and at 12 m. the council opened.

Gov. Stevens said: My children, I stated yesterday that we wished to place you on two reservations and that as regards the tribes below the Umatillas, there was a third reservation which would be explained by my brother Gen'l Palmer, I stated we wanted as many tribes as could be taken care of by one agent.

I will now explain this matter more fully. We wish to put the Spokanes, and Nes Perses, the Walla Wallas, the Cayuses, the Umatillas on one reservation in the Nes Perses country.

Here (showing a draft on a large scale) is a map of the reservation. There is the Snake River, there is the Clear Water River, here is the Salmon River, here is the Grande Ronde River, there is the Palouse River, there is the El-pow-wow-wee.

We commence where this river, the Palouse, comes from the mountains, and down the river to the mouth of

the Ti-not-pan-up, then to the Snake River 10 miles below the mouth of the El-pow-wow-wee, then to the source of the El-pow-wow-wee, thence along the crest of the Blue Mountains to the Grande River below the Grande Ronde, thence along the ridge between the Wall-low-low River crossing the Snake River 15 miles below the mouth of Powder River, thence to the Salmon River a little above the crossing, thence by the spurs of the mountains to the source of the Palouse river at the place of begining [sic].

This is a large reservation. The best fisheries on the Snake river are on it. There are the fisheries on the Grande Ronde River, there are fisheries on the Os-ku-wa-wee and other streams. There are camash grounds here at this place (pointing to the large camash grounds of the Nes Perses). We feel if we put you on this reservation our agent can visit you all and take care of you all.

Each tribe will have its own place on this reservation. The Spokanes will have their place and their home, the Nes Perses their place and their home, the Walla Wallas their place and their home, the Cayuse and the Umatillas their place and their home. The Spokanes will have a blacksmith, a school, and a farmer, the Walla Wallas will have a blacksmith, a school, and a farmer, the Cayuse and the Umatillas will have a blacksmith, a school, and a farmer. The Nes Perses are more numerous. They will have two blacksmiths, two schools, and two farmers.

These schools are the first schools where your children will learn to read and write. The agent will live in some central place where there will be an agricultural and industrial school common to all the tribes. To this school all the tribes will send such of their children as wish to study more than in the first schools, and to learn trades.

Here where the agent lives will be the tinner and tin shop. There will be one for all the tribes. There will be the waggon maker and wheelright. There will be one for all the tribes.

For the four tribes there will be two saw mills and two flouring mills in proper localities. Thus all the tribes will be on an even footing, and each will have the same provision made for them.

You will see that you will be better taken care of all on one reservation, each tribe having its own place, than if the Spokanes were on one reservation with the whites all around them, the Nes Perses on one reservation with the whites all around them, the Cayuses and Umatillas in one reservation with the whites all around them.

Here (showing the map) you will be on one reservation with equal rights under one agent, and with the same provisions for your welfare. But each tribe has its head chief. A chief takes care of his people. His people listen to him, he devotes his time, his very life to their good. We want your chiefs to be such men. We expect them to know about you and to see that we do our part. They will not work for themselves, they will work for you. We shall therefore give the Head Chief of each tribe five-hundred dollars a year for 20 years to be paid in cash.

We shall build for each head chief a good house to live in. The agent will have his house and he will be paid. The head chiefs shall have their houses and be paid. They will all labor for the good of the Indians.

You will be allowed to pasture you [sic] animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads to take your things to

market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites. All that outside the reservation.

My friends, I have held four councils on Puget Sound. I have made treaties with all the Indians on that sound. They number more than all the tribes here present. They have all agreed, should the President decide, to go on one reservation. That reservation is only about one fiftieth part as large as this. They have however few horses and cattle. They have not three-hundred head. They take salmon and catch whale and make oil. They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more.

Now I will tell you the payments that will be made provided you are placed on one reservation. If you go on different reservations different provisions will be made. Will you all go on one reservation Spokanes, Nes Perses, Walla Wallas, Cayuses and Umatillas, we shall spend a certain amount in moving you onto the reservation, in breaking up and fencing your farms, in building houses for your chiefs, your sub-chiefs and your people, in cooking utensils for your houses, in milk pans and churns, in a good supply of blankets and clothing. In all these things we will expend for you One-hundred-thousand dollars. This will be done the first year you go on the reservation.

Now if any man gives up a tract of land in going onto the reservation, he will have the same thing done for him that is done for all the rest, and he will have in addition

his improvements made good to him on the reservation or the value of them paid to him in cash as he may desire.

The other payments extend through twenty-years. Two-hundred and fifty-thousand dollars. We do not want to spend this amount or much of it in cash, and I want my friend Pee-o-pee-mox-a-mox, and the other chiefs to listen while I give the reason. I ask all the chiefs to hear my reasons and think of them.

We can furnish you with nearly twice as many goods with the same amount of money as you can get from the traders. We shall buy the things you want in New York and San Francisco, at cheap rates and good articles. The expense of getting them to you will not come out of your money, it will cost you nothing. You now pay eight or nine dollars for a blanket at Fort Walla Walla. We shall furnish you two such blankets for less than that sum, say from six to seven dollars. At Fort Walla Walla a flannel shirt cost three dollars, we will give you three shirts for three dollars. You pay for a calico shirt at Walla Walla one-and-a-half and two dollars. We can furnish calico shirts for fifty cents a piece. If we furnish the goods therefore you will get three blankets, three flannel shirts and three calico shirts for the same money you now pay for one blanket, one flannel shirt, one calico shirt, and have to make a long journey for them besides. We can furnish four hoes for a dollar and a half. You know what you have to pay for a single hoe at Fort Walla Walla and the Dalles. We want the payments to do as much for your good as possible. We don't want half of it to go into the pockets of traders.

I ask the chiefs to listen to me again.

There will be a certain sum each year for their people. We want them each year to consult their people and tell us what things they want. We want them to make out a list,

how many blankets they want and what kind of blankets, the number of flannel and calico shirts they want, and so for every article of clothing for their men, women, and children. Also the tools they want for their farms, their houses, and their shops. In short we want the chiefs to tell us how they want the money spent. The list [sic] to be made out every summer for the pay of the next year. If you want part of the pay made in money, we want you to give the reasons and state the sum each year. We will send your reasons to the President and let him decide. There are many of you we would be willing to give a part of the payments in money, but not to the men who drink whiskey, and not to the men who do not take care of their wives and children. Let therefore your chiefs each year make out a list of how much money and we will send it to the President.

I have now a few words to say in regards to the Yakama Reservation. The same provisions as regards schools, farms, and shops will be made as in the cases of the Nes Perses Reservation.

Here is the Yakama Reservation, commencing with the mouth of the Attanum River, along the Attanum River to the Cascade Mountains, thence down the main chain of the Cascade Mountains south of Mount Adams, thence along the highlands separating the Pisco and Sakoss River from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama of the Attanum where we began. We propose to place there the Colvilles, the O-kin-a-kanes and Pisquoose Indians (they now send their cattle and horses there in winter) also the bands on the Columbia River below the Walla Wallas down to the mouth of the Kathlapoodle River, also the Klicatat around Mount Adams and

Mount St. Helens. These Klicatat and these bands on the Columbia originally came from here or further north.

We will give one blacksmith, one farmer and one school for the Colvilles, one of each for the Pisquoose and O-kin-ak-kanes, one of each for the Yakamas, one of each for the Yakamas including the Palouses, one of each for the remaining bands. They shall have the agricultural and industrial school as in the other reservation. They shall have the same mechanics, gun smith, tin smith, plough and waggon makers. Here children shall be taught and they will learn trades like the children on the other reservations. They shall have the same liberties outside the reservation to pasture animals on land not occupied by whites, to kill game, to get berries and to go on the roads to market. Payments to be made in the same way as in the Nes Perses Reservation. One-hundred-thousand dollars to be expended the first year. Two hundred and fifty-thousand dollars the next twenty years.

I nead [sic] say nothing more. It is desinged [sic] to make the same provision for all the tribes and for each Indian of every tribe. The people of one tribe are as much the people of the Great Father as the people of another tribe. The red men are as much his children as the white men.

We think this plan will be for your good. We want you to think of it, I have tried to talk plain and to speak straight out. My brother will now speak.

Gen'l Palmer said: My brothers, my brother here has said as much perhaps as could be said. He has told you what we desire to do for you. It is for you to say whether you will receive it or throw it away. We have but one heart. He has been speaking of something which interests

you. It is the duty of your chiefs and your men to think well of it. It was said by this young man (Young Chief) the other day that we were not acting wholly for these that are here now, but for those who come after us. It is the duty of the parent to provide for his children. You may not understand all the advantages of the propositions that have been made to you, but they are for your benefit and those who come after you. As a chief desiring to promote your interest, I say it is good, that I would not deceive you. The Great Spirit who knows the hearts of all men knows that I desire to promote your good.

We expect it will take at least two years to prepare these reservations for you to go onto. If we make a bargain and sign the papers, my brother and myself and all the head chiefs and head men, that paper must go to Washington. Our chief and his council will examine it. If they approve it they say yes, and give us the money to expend in accordance with its provisions.

My brother has stated that you will be permitted to travel the roads outside the reservation. We have some kind of roads which perhaps you have never seen. We may wish to make one of the roads from the settlements east of the mountain to our settlements here. They may desire to run that road through your reservation. If we desire to do so we wish that privilege. That kind of road we call a rail road, I will try and explain to you the way in which we make such roads. We first lay on the ground sticks of timber. We then lay other sticks across, in that way, unite them together and put a strip of iron on the top of them. We then place a waggon on those tracks, and instead of having horses or oxen hitched to the waggon we build a fire. Some of you have seen a steamboat. They have on this waggon a boiler filled with water, the fire heats the water

and produces steam, which propels the machine. I am unable to explain all the machinery or the way in which it works but they will travel faster than your swiftest horse can run, all the time. If we start from here at sunrise we can be at Was-co-pen by the middle of the day. We sometimes attach twenty of those waggons together and one of those engines draws the whole. They will take waggons enough to draw more people than are here. We call the waggon in which they have the fire and water a locomotive. I have rode [sic] on those waggons many a time. So have our people here all or nearly all of them. Now if our chief desires to construct such a road through your country, we want you to agree that he shall have the privilege. You would have the benefit of it as well as other people.

We have another improvement that I wish to speak to you about. It is called a telegraph. We may possibly desire to make such an improvement through your country. We set posts into the ground 15 or 20 feet high, and as far from here as that house. When the posts are set we place a wire on the top about as big as that. This wire extends as far as we wish to make the road if it is 100 or 1000 miles.

If my brother is at Oregon City and desires to speak to the Great Chief he speaks to him if the wires extend that far. The man at the other end of the road will know what he says as quick as I who stand beside him. If the instrument which is attached to this wire should be in your country and a man should steal your horse, and you desire to send word to the Willamette Valley, you would tell this man and he would work the machine and the man in the Willamette would understand you had lost a horse, and before the thief could reach there they would know it, arrest him before he came. You may not understand them

now, but when you know as much as the white man you will.

Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for you injury.

I told you yesterday I would explain to you another reservation, but that reservation is for the people who live below here. There are but a few of them here, and as I expect to hold a council with them when I return, and as that reservation does not particularly interest you, I need not explain it now.

Now I want you all to talk among yourselves and think about what has been said to you, and I want you to think of it like men. When you think of it if you say that what we have said is good and that you receive it, you can express it to us and we can soon write out the treaty.

You are now tired, you have been long sitting. You know our hearts,

* * *

talking a great deal. That talk has been for your good. We came here to talk straight. We have shown you our hearts. We will not lie to you. Yesterday we made a bargain with the Cayuses, the Walla Wallas, and the Umatillas, and the day before with the Nez Perces. The Looking Glass was not here but we did not forget him. We know that when he understands it all he will say yes! This morning we made a bargain with the Yakimas. They with these others all say yes. We expect the Looking Glass and his people will all say yes. We have told these people and it is so said in the paper that their horses and cattle would be allowed to

graze outside of the reservation the same as our people when it was not occupied by whites. If we change the line to where he says we would have to stay here two or three days more to arrange the paper. We are all tired. You are tired. Shall we say one thing today and another thing tomorrow?

They have said yes! My heart says yes to the line that was shown yesterday and today. All things will be done as we told you. Shall we do so my heart says yes. I have nothing more to say.

Looking Glass: Yes! Let it be so.

Eagle from the Light: When I spoke to you before I said that I should speak slowly and I have been thinking about what to say, but I don't know yet what to say. These people have been talking among themselves as though there was two. And when I heard what they had to say I said very well. Let us go as two.

Looking Glass: What I showed these people when I came here I spoke beyond it (refering to the map) and you have said that this talk you would send to the President and he will see it.

You see my body, it is not divided. It is one body as these are all my children (pointing about). They have all got horses and cattle. That is the reason I made it larger.

I want you to talk plain just like the Light and then I will say yes. That is all I have to say now.

Gov. Stevens: I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by

settlers, that he can catch fish at any of the fishing stations, that he can kill game and can go to buffalo when he pleases, that he can get roots and berries on any of the lands not

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occupied by settlers. He knows what the reservation is, that we promise him two mills, a saw and grist mill, two schools and a blacksmith, that we give him a physician and all the other things that have been spoken of. The people all know it. It has been read over two or three times.

This reservation is in his own country. I ask Looking Glass, is not this talking straight? We send all this to the President and besides this we pay a certain sum of which you all know. We have been looking for him ever since we have been here. Lawyer will recollect that I have been enquiring when will Looking Glass come? We wanted him to come.

Those who go to the buffalo are all my children. I am going to see the Blackfeet next moon. The Blackfeet had stolen some of his horses, but he got them back again. I heard the story last night. He killed some of their men.

I know that Looking Glass wants me to go and make peace in that country. Let us first agree here.

Gen. Palmer: We buy your country and pay you for it and give the most of it back to you again.

Looking Glass: You have said to me that the whites shall not go over that line, none shall go into that country, and this you said and it is said. And you will show to the President what we have said.

Gov. Stevens: I understand Looking Glass has consented with the other chiefs. The papers are now ready to sign. Here I will particularly speak to Kam-i-ah-kan as the head chief of the Yakimas, are you ready?

Young Chief: What the Looking Glass says, I say.

Gov. Stevens: I ask you whether you are ready to sign! I stated that whatever the Looking Glass said and we said would go to the President. We agreed upon a line yesterday and the day before. The papers are drawn. We ask are you now ready to sign those papers and let them go to the President.

Looking Glass: That he said yes to his line.

Gov. Stevens: Looking Glass is satisfied with the Nez Perce line, the Young Chief and Pe-pe-mox-mox yesterday agreed to the Umatilla reserve.

Looking Glass: I said yes to the line I marked myself, not to your line.

* * *

APPENDIX H

157 F.3d 762

Ronald CREE, Jr.; Dalton Cree; Jack Haggerty; Douglas Beebe; Joseph Yallup; Carl Boyle; Richard "Kip" Ramsey, dba Tiin-Ma Logging Co.; Tiin-Ma Logging Company; Wheller logging,
Plaintiffs-Appellees,

and

Yakama Indian Nation,
Plaintiff-Intervenor-Appellee,

v.

Juan FLORES; Mike Worlund: Keith Qunell,
Defendants-Appellants.

WHEELER LOGGING,
Plaintiff-Appellee,

and

Yakama Indian Nation; Delbert Wheeler, Plaintiffs-Intervenors-Appellees,

v.

Annette SANDBERG; Mike Worland,
Defendants-Appellants.

No. 97-35305.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 6, 1998.

Decided Oct. 8, 1998.

Fronda Woods, Assistant Attorney General, Olympia, Washington, for defendants-appellants.

Tim Weaver, Cockrill & Weaver, Yakima, Washington, for plaintiffs-appellees Ronald Cree, Jr., et al. and plaintiff-intervenor-appellee Yakama Indian Nation.

Jack W. Fiander, White Swan, Washington, for plaintiff-appellee Wheeler Logging and plaintiff-intervenor-appellee Delbert Wheeler.

Stephanie L. Striffler, Special Counsel to Attorney General, Salem, Oregon, for amicus curiae State of Oregon.

Appeals from the United States District Court for the Eastern District of Washington; Alan A. McDonald, District Judge, Presiding. D.C. Nos. CV-89-00458-AAM, CV-92-03100-AAM.

Before: CANBY and TASHIMA, Circuit Judges, and TAKASUGI, District Judge.*

TASHIMA, Circuit Judge:

Defendants, various Washington State officials ("Defendants"), appeal the district court's grant of summary judgment in favor of the Yakama Indian Nation and individual Yakama Indians holding that the Treaty with the Yakamas ("Yakama Treaty" or "Treaty") exempts them from various Washington truck license and overweight permit fees. The Treaty clause in issue assures the Yakamas "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, Art. III, 12 Stat. 951, 953 (1855).[1] We hold

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* Honorable Robert M. Takasugi, Senior United States District Judge for Central District of California, sitting by designation.

[1] Article III in its entirety provides:

> *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from

(Continued on following page)

that the district court did not err in interpreting the Yakama Treaty as exempting the Yakama Indians from the fees at issue. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

A. Factual Background

Washington law requires registration and licensing of trucks according to gross weight, higher fees being charged for greater weights. *See* RCW §§ 46.16.070, 46.16.135 (monthly tonnage licenses), 46.44.095 (temporary tonnage permits). Trucks owned by individual Indians have never been exempt from such license fees. Washington also requires log tolerance permits for certain overweight trucks along with payment of a fee. RCW §§ 46.44.047, 46.44.095 (temporary tonnage permit). Again, individual Indians have never been exempt from such fees. Under Washington law, violations of the weight licensing requirements may result in traffic infractions.

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the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty with the Yakamas, Art. III, 12 Stat. 951, 952-53 (1855).

RCW §§ 46.16.010, 46.16.135, 46.16.140, 46.16.145. Fees paid to the State of Washington (the "State") for truck registration, licensing, and log tolerance permits are credited to the state motor fund and used primarily for highway purposes. RCW §§ 46.68.030, 46.68.035. *See generally Yakama Indian Nation v. Flores,* 955 F.Supp. 1229, 1232-33 (E.D. Wash. 1997).

Plaintiff-Intervenor Yakama Indian Nation (the "Yakama Nation" or "Nation") sells timber from lands held in trust by the United States for its own and its members' benefit. It enters into timber sales contracts with purchasers who must employ tribal members when possible. Individual Plaintiffs in both consolidated cases operate logging trucks that haul logs from tribal timber sales within reservation lands to off-reservation mills. *Cree* plaintiff Richard "Kip" Ramsey owns the Tiin-Ma Logging Company ("Tiin-Ma Logging") and began his logging business in 1978, becoming the first Indian logger to haul tribal timber off-reservation. The remaining *Cree* plaintiffs are employed as drivers for Tiin-Ma Logging and, with one exception, are enrolled members of the Yakama Nation. In the second consolidated case, *Wheeler,* Plaintiff-Intervenor Delbert Wheeler is the owner of Plaintiff Wheeler Logging and is an enrolled Yakama Indian who began his operations in 1987.

Defendants are state officers authorized to issue traffic citations for violations of State vehicle registration, licensing and permitting statutes. Plaintiffs brought suit after the officers issued traffic citations to Tiin-Ma Logging and Wheeler Logging drivers because their owners had refused to pay applicable tonnage licensing fees and had not obtained log tolerance permits for their trucks. Afterwards, the officers began issuing citations to the

drivers for failing to possess proper registration. All of the state enforcement actions challenged in this case occurred outside the boundaries of the Yakama Indian Reservation.

B. Procedural Background

1. First Proceedings in the District Court

Plaintiffs contend that the Yakama Treaty protects their right to haul tribal timber to off-reservation markets over state highways without restriction; therefore, that the State cannot impose licensing and permitting fees on logging trucks owned by the Nation or its members. They contend that Defendants have deprived them of their rights under the Treaty.

Cree Plaintiffs filed suit against the State and several of its officers on July 3, 1989. On June 1, 1991, the district court granted their motion for a preliminary injunction enjoining Defendants from issuing citations to Tiin-Ma Logging or its drivers for violations of the tonnage licenses under RCW § 46.16.070 and the log tolerance permits under RCW § 46.44.047. Wheeler Logging filed suit on September 8, 1992 and the district court subsequently issued a preliminary injunction similar to the *Cree* injunction. The district court consolidated the cases on March 6, 1993.

After the court ordered the individual Plaintiffs to show cause why their claims should not be dismissed under the Tax Injunction Act, 28 U.S.C. § 1341, the district court granted the Yakama Nation's motion to intervene as a party-plaintiff in both the *Cree* and *Wheeler* actions. It also dismissed the individual Plaintiffs' claims challenging the financial obligations under the truck licensing and

permitting laws, holding that it lacked subject matter jurisdiction under the Tax Injunction Act.[2]

In late 1994, the district court held that prior decisions regarding the Nation's fishing rights under Article III, paragraph 2, of the Treaty governed the meaning of the term "in common with" in the public highways clause, Article III, paragraph 1, of the Treaty. *Cree v. Waterbury,* 873 F.Supp. 404 (E.D.Wash.1994). Accordingly, it further held that, under the Treaty, the Yakama Nation and its members retained the right to travel the State's public highways without paying user fees while hauling tribal goods. *Id.*

2. Prior Appeal to the Ninth Circuit[3]

Defendants appealed the district court's ruling on the Treaty interpretation issue and this court reversed. *Cree v. Waterbury,* 78 F.3d 1400, 1404 (9th Cir.1996). We held that the term "in common with" in the fishing right cases did not, by itself, define the nature of the public highways right. We directed the district court to undertake "[a] factual investigation into the historical context and the parties' intent at the time the Treaty was signed [in order to] determine the precise scope of the highway right." *Id.* We then remanded the case to the district court with

[2] The district court, however, did not dismiss those claims which challenged the licensing and permitting requirements in and of themselves, as opposed to the requirement that Plaintiffs must pay to obtain the licenses and permits.

[3] This was actually the second appeal to reach this court. The first appeal involved the issue of immunity of the State defendants. *See Cree v. Washington,* 990 F.2d 1256, 1993 WL 115230 (9th Cir.1993) (Table).

instructions to "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Id.*

3. District Court Proceedings on Remand

a. Factual Inquiry

On remand, the district court held an extensive evidentiary hearing on the issue of the intent of the parties to the Treaty. It considered the testimony of three expert witnesses, two Plaintiffs and two State employees, along with numerous exhibits. *See Yakama Indian Nation,* 955 F.Supp. at 1236.

Plaintiffs presented two expert witnesses. The first, William Yallup, a full-blood Yakama Indian, has deep ties to the Yakama Nation going back to those who were present when the Treaty was negotiated. For 25 years he has served on the Yakama Nation Executive Committee and from 1985-90, he served as its Director and Cultural Specialist. Mr. Yallup testified as to the meaning of the Treaty to the Yakamas. *Id.*

Plaintiffs also offered the testimony of Dr. Deward Walker, an anthropologist who is an expert in ethnology, the comparative interpretation of cultures, based on their history, structure and functioning. Dr. Walker has spent his entire career studying the culture of North American Indian tribes and has been working with the Yakama Nation since the 1950's. He has authored several publications about the Plateau Indians which relate to the Yakama. *Id.* at 1236-37.

Defendants presented the testimony of Dr. Kent Richards, a professor of history at Central Washington University. Dr. Richards is an expert on Isaac I. Stevens, the Territorial Governor of Washington at the time of the Treaty. Dr. Richards was asked to examine the Yakama Treaty in the context of United States Indian policy at the time it was negotiated – the mid 19th Century – and in the context of previous treaties. He was asked particularly to examine the public highways clause and how that clause was carried out and interpreted after the Treaty. Dr. Richards based his opinions almost exclusively on his review of written sources; he did not speak with any Yakama members. He relied upon primary sources generated by participants or observers at or near the time of Treaty negotiations. *Id.* at 1237.

On the basis of this extensive record, the district court examined the importance of the Treaty to the Yakamas, the historical context of the Treaty, the Treaty negotiations at the Walla Walla Council, and the actions of the parties since the Treaty. *Id.* at 1237-46. It considered Mr. Yallup the ultimate expert in this proceeding, stating that it viewed his testimony with "considerable respect." *Id.* at 1237. On the importance of the Treaty to the Yakamas, the court noted that both of Plaintiffs' experts testified as to the Yakamas' sacrosanct view of the Treaty. The court found that "[t]he treaty embodies spiritual as well as legal meaning for the tribe; it enumerates basic rights secured to the Yakamas that encompass their entire way of life. Thus, each provision in the Treaty, including Article III, paragraph 1, has special meaning." *Id.* at 1238.

Turning to the Treaty's historical context, the district court first examined the significance of travel to the Yakamas, terming travel "an essential component of the

Yakamas' way of life". To the Yakamas, travel was significant for many reasons, including trade, subsistence, and maintenance of religious and cultural practices. *Id.* The court emphasized that the intrinsic connection between trade and religion for the Yakamas could only be facilitated through travel. Travel was also absolutely necessary for the Yakamas to maintain their fishing practices which were and remain of paramount importance to the tribe. *Id.* at 1239. The district court noted that Governor Stevens knew of the significance of travel to the Yakamas when he entered into Treaty negotiations, as demonstrated by reports made to Stevens by his deputy and statements made to the Yakamas during the Treaty negotiations. *Id.* at 1240.

The district court then examined pre-Treaty contacts between the Yakama and whites, finding that until the 1850's the Yakamas' contact with whites was mostly limited to encounters with explorers, traders and missionaries. The court found that Governor Stevens was under tremendous pressure to negotiate treaties quickly with eastern Washington tribes, because lands occupied by them were important in settling the Washington Territory and the government sought to avoid hostilities between whites and Indians. The court found that Stevens needed access through Yakama land to construct roads for settlers and a railroad route. For this reason, the Yakamas were considered of great importance to Stevens and the United States. *Id.* at 1240-41.[4]

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[4] The court also noted that Stevens doubled as Chief Engineer of the Northern Division of the Pacific Railroad Surveys chartered by

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Governor Stevens sent several delegates to visit the Yakamas prior to Treaty negotiations. Captain George McClellan, commanding officer of the Western Division of the Pacific Railroad Exploration, spent several weeks with the Yakamas and told them that Stevens would be coming in the next year or so to discuss a Treaty. McClellan viewed the Yakamas differently from other tribes in eastern Washington because their country was to become a thoroughfare for the whites and realized the importance of making a good impression on the Yakamas. *Id.* at 1241. Before Treaty negotiations began, Stevens sent two other delegates to visit with the Yakamas and prepare them for negotiations. *Id.* at 1242.

The parties agreed that the Treaty minutes accurately capture what Governor Stevens and General Joel Palmer told the Yakamas at the Treaty negotiations at the Walla Walla Council in 1855. *Id.* Governor Stevens began the negotiations by expressing the government's desire to improve the lifestyle of tribal members and assure peace. To this end, he resolved to protect the Indians from "bad white men" if the tribes agreed to live within designated reservations. Stevens promised that if the tribes acquiesced to living on reservations, each one would include a blacksmith, a carpenter shop, a saw mill, a grist mill, along with an Indian agent to protect them from "bad white men." Palmer guaranteed that "[i]f we make a treaty with you and our Great Chief and his council approves it,

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Congress to ascertain the most expedient transcontinental railroad route. 955 F.Supp. at 1240.

you can rely on all its provisions being carried out strictly."[5]

The district court noted that the Yakamas' right to travel was repeatedly broached, most often by Stevens or Palmer. As explained to the Yakamas, entering into the Treaty would not infringe upon or hinder their tribal practices. Instead, the Treaty was presented as a means to preserve Yakama customs and protect against further encroachment by white settlers. *Id.* at 1244. There was no mention of any sort of restriction on hunting, fishing or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation. Overcoming some reluctance, the Yakamas agreed to the Treaty provisions on June 9, 1855. *Id.* at 1245.

Next, turning to an examination of the actions of the parties since the Yakama Treaty, the district court noted that the Yakamas continued to travel off-reservation years after ratification of the Treaty. The court noted that scant evidence was before it on the issue of the Yakamas' understanding of the claimed right to be free from state registration, permitting and licencing requirements when hauling tribal goods to market. Yakamas traveled on the State's public roads and highways without charge until the State began enacting statutes which imposed licensing and permitting fees. The district court found evidence that suggested that the Yakamas objected to roads being built through the reservation without tribal approval. It also

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[5] Presumably, the "Great Chief" refers to the President while "his council" refers to Congress.

found that individual Plaintiffs had previously brought suit in federal and state court challenging the State's imposition of licensing and permitting fees for their logging trucks. Despite court rulings in favor of the Yakamas, the State continued to impose those fees until the preliminary injunctions were issued in these cases.

b. District Court Rulings

First addressing the meaning of the term "in common with" in Article III, paragraph 1 of the Treaty, the district court found that neither party presented evidence suggesting that the term was ever explained to the Yakamas. *Id.* at 1246. The court found that the Yakamas understood this term to mean that no impediment was placed on their customary practice of travel or their right to travel to market. *Id.* at 1247. The court also found that "the Yakamas understood the term 'in common with' as common usage among Indians and non-Indians with no restrictions placed upon tribal members." *Id.* This finding is supported by the historical context of the Treaty, the negotiations themselves and Stevens' intent. *Id.* at 1247-49. The court rejected Defendants' arguments that "in common with" meant to place the Indians on an equal footing with whites. *Id.* at 1249-52. It also rejected Defendants' attack on the Yakamas' traditional system of travel. *Id.* at 1252-53. Next, the court rejected Defendants' assertion that the actions of the Yakamas, both pre- and post-Treaty, indicate that they did not expect or intend to be free of fees imposed for use of the public highways. *Id.* at 1253-55. Finally, the court rejected Defendants' contention that

license fees allocated for preservation and maintenance purposes are permissible, notwithstanding the Yakamas' Treaty travel right. *Id.* at 1255-56.[6]

II. JURISDICTION

The district court had jurisdiction over the Yakama Nation's claims under 28 U.S.C. §§ 1331 and 1362. It had jurisdiction over the individual Plaintiffs' challenges to RCW § 46.16.010 under 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We review de novo the interpretation and application of treaty language. *See United States v. Washington,* 969 F.2d 752, 754 (9th Cir.1992); *Dillon v. United States,* 792 F.2d 849, 852 (9th Cir.1986). Underlying factual findings, including findings of historical fact, are reviewed for clear error. *United States v. Lummi Indian Tribe,* 841 F.2d 317, 319 (9th Cir.1988). A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105

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[6] The district court also held that, under *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the challenged fees were preempted by federal law because they are not apportioned to account for actual off-reservation travel. *Yakama Indian Nation,* 955 F.Supp. at 1257-60. Because of our disposition of the Treaty interpretation issue, we do not reach this apportionment claim.

S.Ct. 1504, 84 L.Ed.2d 518 (1985); *see also Lummi,* 841 F.2d at 319. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 470 U.S. at 573, 105 S.Ct. 1504. We review de novo the trial court's application of law to facts. *United States v. Skokomish Indian Tribe,* 764 F.2d 670, 673 (9th Cir.1985).

We review for an abuse of discretion the trial court's equitable ruling that non-Indians may exercise Yakama Treaty rights. *Cf. United States v. Washington,* 520 F.2d 676, 688 (9th Cir.1975) (holding that district court's apportionment of fishing rights between tribes was an equitable decision reviewed for abuse of discretion).

IV. DISCUSSION

The district court eloquently set forth its findings that travel was of great importance to the Yakamas, that they enjoyed free access to travel routes for trade and other purposes at Treaty time, and that they understood the Treaty to grant them valuable rights that would permit them to continue in their ways. We agree with the district court that, in light of those and its other findings, the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use. We conclude that the State's challenges to the district court's decision and interpretation lack merit, for the reasons we now set forth.

A. Interpretation of the Yakama Treaty

1. Legal Framework

Supreme Court jurisprudence teaches that Indian Treaties must be interpreted as the Indians would have understood them.

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them. . . .

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970) (citations omitted).

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. Washington, 315 U.S. 681, 684-85, 62 S.Ct. 862, 86 L.Ed. 1115 (1942) (citation omitted); *see also United States v. Winans,* 198 U.S. 371, 380-81, 25 S.Ct. 662, 49 L.Ed. 1089 (1905) ("we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand. . . . '" (citation omitted)); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 676, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (*"Fishing Vessel"*); *Jones v. Meehan,* 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899). Any doubtful expressions in

the Treaty should be resolved in the Yakamas' favor. *See Choctaw Nation,* 397 U.S. at 631, 90 S.Ct. 1328.

Our prior opinion specifically acknowledged these canons of Indian treaty interpretation. *See Cree,* 78 F.3d at 1403 (citing *Fishing Vessel*); *see also United States v. Washington,* 774 F.2d 1470, 1481 (9th Cir.1985) (citing, *inter alia, Choctaw* and *Tulee*). We ultimately reject Defendants' appeal, in part because their arguments fail to embrace these principles and attempt to cabin our consideration to selective language from our prior opinion.

2. Treaty Language as a Whole

Defendants contend that the Treaty language as a whole contradicts the trial court's interpretation that the purpose of the "public highways" clause was to preserve the Yakamas' ancient customs. First, they assert that the district court interpreted the highways clause as redundant to the fishing clause. According to Defendants, the district court made the same error it made in 1994 when it said that the "public highways" right was inseparable from the Treaty right of taking fish and this court directed it to give the "public highways" clause its own meaning. *See Cree,* 78 F.3d at 1404. The district court, however, clearly evaluated the public highways clause on its own and in terms of the Treaty as a whole.[7] We conclude that the

[7] The relevant findings state:

62. Reading of the Treaty language as a whole reflects that the term "public highways" should be read with its common understanding, meaning a road open to all or for common usage.

(Continued on following page)

district court specifically gave the "public highways" clause its own meaning. *See Yakama Indian Nation,* 955 F.Supp. at 1266 ("68. The language of Article III of the Treaty reflects the promises made by Stevens and Palmer in the Treaty discussions and guarantees to the Yakamas the right of free use of the public highways. P-1; P-2.").

Defendants next contend that the trial court disregarded the term "public highways" and failed to follow this court's instruction to determine how "the Indians understood their right to use government-built highways." *See Cree,* 78 F.3d at 1404. They contend that the evidence does not support an inference that the parties understood the right to use nonexistent "public highways" as preserving ancient Indian customs; instead, the language of the Treaty shows that the right was future-oriented. While Defendants make much of the district court's invocation of "ancient Indian customs," the district court expressly stated that the activities which were at issue were the Yakamas' right to travel for fishing, hunting, gathering and trade purposes. *See, e.g., Yakama Indian Nation,* 955 F.Supp. at 1266 (Findings of Fact 70, 73). Thus, the alleged inconsistency between "ancient Indian customs" and "future-oriented activities" dissolves. The district court found that the Treaty secured for the Yakamas the right to use future roads to access Puget Sound and to

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63. Stevens and his representatives, both prior to and at the Treaty negotiations, clearly indicated that the roads they were discussing with the Indians were "public" roads open to all the settlers. P-2; P-17, D-335 at pp. 4, 7, 11, 14, 15; P-23; P-24, D-348.

Yakama Indian Nation, 955 F.Supp. at 1265.

trade their goods. *See id.* at 1265, 1266 (Finding of Fact 67, 70).

Defendants next argue that the district court disregarded Treaty provisions designed to promote settlement. According to them, the plain language of the Treaty expressly limits Indians' off-reservation activities; therefore, the district court erred in holding that the Treaty entitles Yakamas to travel outside reservation boundaries "with no conditions attached." *Id.* at 1251. Defendants also contend that the district court disregarded the Yakamas' promise to respect settlers' government and property. According to Defendants, these facts suggest that the Indians understood that they would respect settlers' rules when they used settlers' property and the record contains no evidence that the Indians thought a different principle would apply to settlers' roads. According to Defendants, the district court disregarded Treaty provisions designed to foster assimilation in finding that the Treaty was presented as a means to preserve Yakama customs.

Here, Defendants present alternative factual bases to support their theory of the case. The district court did not clearly err in rejecting Defendants' interpretation. *See Skokomish Indian Tribe,* 764 F.2d at 673. It found that "Stevens did not communicate an intention to assimilate Yakamas with non-Indians or otherwise place the Yakamas on 'equal footing' with non-Indians." *Yakama Indian Nation,* 955 F.Supp. at 1266 (Finding of Fact 73). Although there is evidence to support Defendants' interpretation, we cannot say that viewing "the entire evidence" we are "left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S. at 573, 105 S.Ct. 1504.

Moreover, Defendants contend that assimilationist parts of the Treaty are somehow inconsistent with an intent to preserve Yakama customs and that the government did not present the Treaty as a means to preserve Yakama customs. However, an examination of the Treaty and the context indicates that it contained both elements of assimilation and of preservation of Yakama customs. Certainly, Stevens "sold" the Treaty to the Indians as a means of preserving their customs.[8] The Treaty unquestionably contained elements of assimilation, such as the establishment of reservations and state-sponsored schools and mills on those reservations. In the end, the Treaty attempted to serve the purposes of the United States while remaining acceptable to the Yakamas. It is not surprising, therefore, that it contained multiple, and perhaps conflicting, purposes. Defendants fail to demonstrate how the existence of assimilationist elements in the Treaty proves that the "public highways" clause could not serve the function of preserving Yakama customs.

The Treaty provides that the Yakamas may use public highways "in common with citizens of the United States." The district court interpreted "in common with" to mean that the Yakamas could use the public highways together with citizens. Defendants claim that the district court stated that Yakamas can only be required to buy state licenses if Stevens told them in 1855 that "in common

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[8] For example, Stevens represented: "We do not want you to agree not to get roots and berries and not to go off to the buffalo. We want you to have your roots and to get your berries, and to kill your game. We want you if you wish to mount your horses and go to the Buffalo plains. . . ."

with" meant they must pay the same fees as non-Indians. The district court did not so state. It held that "[g]iven the fact that Stevens and his agents viewed the Yakamas and other tribes at the Council as unlearned savages, it is highly unlikely that he would have expected payment from them in order to maintain public highways." *Yakama Indian Nation,* 955 F.Supp. at 1251. Moreover, the district court held that "even if Stevens and the United States intended to limit the Yakamas' right to travel, that intent was not expressed at the Treaty negotiations." *Id.* The district court correctly looked at how the Indians would naturally have understood the terms of the Treaty and resolved any doubts and ambiguities in their favor. *See Fishing Vessel,* 443 U.S. at 658, 99 S.Ct. 3055; *Tulee,* 315 U.S. at 684-85, 62 S.Ct. 862; *Winans,* 198 U.S. at 380-81, 25 S.Ct. 662. After reviewing the Treaty Minutes, we agree with the district court that there is no evidence that Stevens or his delegates communicated any intent to the Yakamas to limit their right to travel.

Defendants further contend that the district court disregarded the phrase "citizens of the United States" in parsing the provision and that the provision should be interpreted in light of the constitutional right to travel. Defendants made the same argument to this court on the prior appeal. *See Cree,* 78 F.3d at 1404-05. We stated then:

> We do not hold as a matter of law that the highway right must be interpreted to bar the State from imposing truck fees on the Yakama Indians to prevent the highway right from being mere surplusage. However, we cannot hold as a matter of law that the Treaty gave the Yakamas rights no greater than those of any non-Indian U.S. citizen.

Id. at 1405. We then instructed the district court to undertake a factual investigation to determine the precise scope of the highway right. *Id.*

The district court's interpretation of the term "in common with" is consistent with the Supreme Court's treatment of that term in the fishing rights cases. For example, in *Tulee,* the Court held that "despite the phrase 'in common with citizens of the Territory,' Article III conferred upon the Yakamas continuing rights, *beyond those which other citizens may enjoy,* to fish at their 'usual and accustomed places'. . . . " 315 U.S. at 684, 62 S.Ct. 862 (emphasis added) (citation omitted). Moreover, in *Winans,* the Supreme Court rejected the argument that "'in common with the citizens of the Territory' confers only such rights as a white man would have. . . . " *Winans,* 198 U.S. at 379, 25 S.Ct. 662. *See also Fishing Vessel,* 443 U.S. at 679, 99 S.Ct. 3055 (holding that the right to take fish "in common with non-Indian citizens" gave the Indians a right to a class share of fish, not just an "equal opportunity" to catch fish on the same grounds as non-Indians). Thus, we decline Defendants' invitation to interpret "in common with" against the grain of Supreme Court precedent and in contravention of the district court's factual inquiry into the meaning of the language in the context of the Treaty. As the Supreme Court pointed out in *Puyallup Tribe v. Department of Game,* 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968), "[T]o construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" *Id.* at 397, 88 S.Ct. 1725 (citation omitted).

3. Historical Context

Defendants contend that the historical context of the Yakama Treaty does not support the district court's interpretation. They first contend that the district court refused to analyze evidence about the Yakamas' Treaty-time environment, such as toll roads and ferries. Defendants further assert that there is no evidence that any Indian expected to use settlers' roads without paying tolls. On the other hand, however, there is no evidence that any Yakama expected to pay such tolls.

Defendants contend that the district court disregarded federal Indian policy which was to assimilate Indians into American society. They are incorrect. The district court considered such evidence, but rejected it because it found that the Yakamas were unlikely to have understood the intricacies of United States Indian policy. *Yakama Indian Nation,* 955 F.Supp. at 1249-51. This finding is not clearly erroneous.

Defendants contend that there is no evidence that the Yakamas were of "vital importance" to the United States. They contend, correctly, that most of the exhibits do not even mention the Yakamas. They contend that the government did not accommodate the demands of the Yakamas more than it accommodated the demands of other tribes. While the Treaty Minutes do not demonstrate any special interest in the Yakamas on the part of Governor Stevens, the district court correctly focussed on the Yakamas' understanding of the public highways clause. It is worth noting that, although Governor Stevens negotiated with the Northwest tribes many treaties containing parallel provisions, only the treaties with the Yakamas and Nez Perce contained highway clauses like this one.

The evidence clearly reveals the importance of travel to the Yakamas and Mr. Yallup's testimony shows how the Yakamas understood the Treaty and the public highways clause. Thus, whether or not there is evidence that the Yakamas were "of vital importance" to the United States is besides the point.

Defendants next contend that the United States could not have intended a promise of questionable constitutional validity because in the 19th Century it was thought by some that the United States could not constitutionally deprive the states of the right to collect tolls. *See Smith v. Turner,* 48 U.S. (7 How.) 283, 403, 12 L.Ed. 702 (1849) (McLean J.); *see Searight v. Stokes,* 44 U.S. (3 How) 151, 179-80, 181-82, 11 L.Ed. 537 (1845) (McLean, J., dissenting), (Daniel, J., dissenting); *Chosen Freeholders v. New Jersey R. & Transp. Co.,* 24 N.J.L. 718, 728-30 (1853). We reject this contention because Defendants fail to explain how a debate among Justices of the Supreme Court would have affected Stevens' negotiations with the Yakama, thousands of miles away. There is no evidence that Stevens was even aware of this debate, much less that he received any instructions on this subject from his superiors. In fact, Stevens received only the most general instructions in negotiating the treaties with various Indian tribes. Accordingly, we reject this argument.

4. Practical Construction

Defendants contend that the district court failed to execute our directive "to examine . . . the conduct of the parties since the Treaty was signed" to discern their intent. *Cree,* 78 F.3d at 1405. They maintain that the conduct of the Yakama Treaty parties during the years

since the Treaty was signed shows clearly their understanding that Yakamas would follow settlers' laws when they used off-reservation public highways.[9] Relying on *Choctaw,* Plaintiffs argue that practical construction has no importance. The truth lies somewhere in the middle. While examining the parties' actions may be helpful in construing a treaty, *see, e.g., Hagen v. Utah,* 510 U.S. 399, 411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), in this case, post-Treaty activity is inconclusive. Defendants are correct that the Yakamas did not challenge off-reservation road fees for many years. The proper focus, however, is on the type of tax at issue here. The most salient point is that no Indian hauled tribal timber off-reservation until 1978. Thus, the post-1978 period is the most relevant period of inquiry. Indians began challenging the fees at issue here in 1981. They have asserted their rights under the Treaty, as they understand them, in a timely manner.

B. Evidentiary Challenges

1. Pretrial Order Violation

Defendants first contend that the district court relied on speculation and extra-record hearsay instead of admissible evidence. Specifically, they contend that the district court violated a pretrial order which permitted the use of

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[9] Specifically, Defendants assert that Yakamas never claimed any exemption from off-reservation road taxes until the 1980s. They contend that the district court's finding that the Yakama Indians did not use roads to take goods to market is clearly erroneous. They further contend that the finding that "Yakamas traveled Washington's public roads and highways without charge" until the 20th century has no support in the record.

the Treaty Minutes contained in a book, but barred the use of editorial comments contained on this copy of the Minutes, as they were not part of the official minutes. Even if there were error on this point, it was harmless. *See* Fed.R.Civ.P. 61; 28 U.S.C. § 2111. Defendants have failed to show how this asserted error affected their substantial rights. *See, e.g., Rogers v. Raymark Indus., Inc.,* 922 F.2d 1426, 1432 (9th Cir.1991) (holding that improper violation of pretrial order by admitting excluded evidence was harmless error). The district court relied on these sources in two footnotes in the course of a 100-page opinion. Any error did not affect the outcome of the district court proceedings and was therefore harmless.

2. Evidentiary Errors

Defendants next contend that the district court committed numerous evidentiary errors which led it to interpret the Treaty erroneously. First, they maintain that the district court improperly relied on hearsay – specifically the testimony of William Yallup – to interpret the Treaty.[10] We reject this contention because Mr. Yallup testified as an expert witness; therefore, his testimony was not subject to the strictures of Federal Rules of Evidence 602 and 803. *See* Fed.R.Evid. 703.

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[10] In support of the contention that Mr. Yallup was not competent to render an opinion about Treaty-time understanding, appellants cite to *Cermetek, Inc. v. Butler Avpak, Inc.*, 573 F.2d 1370, 1376-77 (9th Cir.1978). This case is not relevant as it addresses the interpretation of a contract rather than a treaty and does not involve expert testimony. *See id.*

Defendants also challenge the district court's "undue reliance" on Mr. Yallup's testimony. They assert that tribal-elder testimony about ancient events has limited evidentiary force because "testimony of tribal elders may not be 'the most accurate and authoritative data.'" *United States v. Washington,* 730 F.2d 1314, 1317 (9th Cir. 1984) (citations omitted). However, appellants take the above statement out of context as the *Washington* decision literally dealt with the interpretation of data. *See id.* at 1317-18 (issue before the court was whether the Makah Tribe's usual and accustomed fishing grounds extended 100 miles offshore in 1855). In contrast, the issue in this case is the parties' understanding of the Treaty language, a far less precise issue.

Testimony of this sort by Yakama elders has been sanctioned for over twenty years. *See United States v. Washington,* 384 F.Supp. 312, 350 (W.D.Wash.1974), *aff'd,* 520 F.2d 676 (9th Cir.1975) (holding that the oral testimony of Yakama tribal members educated in tribal history and customs is found by the court to be reasonable and credible factual data regarding relevant aspects of Yakama Indian life and of the intentions and understandings of the Indian representatives present at Walla Walla).[11] The district court was entitled to accord Mr. Yallup's testimony preference over that of the other experts. *See Skokomish Indian Tribe,* 764 F.2d at 673 ("the findings of a district judge, made in reliance on controverted expert testimony, will not be disturbed unless clearly erroneous") (citation

[11] Were it otherwise, the history and culture of a society that relies on an oral history tradition could be brought before the fact finder only with the greatest of difficulty and probably with less reliability.

omitted). Further, it is clear from Judge McDonald's meticulous opinion that he based his findings of fact on the testimony of all three experts, as well as on the 129 exhibits which he reviewed. *See Yakama Indian Nation,* 955 F.Supp. at 1267.

Defendants also impugn the testimony of Dr. Walker because he contacted members of tribes with an interest in this case as the trial date neared and because prior to this litigation Dr. Walker had never talked to them about road tolls, taxes, or licenses in relation to the Yakama and Nez Perce Treaties.[12] Defendants contend that Dr. Walker's opinion was based on recent hearsay and was therefore entitled to little value as an indicator of Treaty-time intent. Defendants waived this argument by failing to challenge the admissibility of Dr. Walker's testimony at trial. *See City of Phoenix v. Com/Systems, Inc.,* 706 F.2d 1033, 1038-39 (9th Cir.1983). Moreover, Defendants' objection goes to the weight of Dr. Walker's testimony, a matter for the district court to consider, and not its admissibility. *See United States v. Senchenko,* 133 F.3d 1153, 1157 (9th Cir.1998). Accordingly, we reject this argument.

C. Exercise of Treaty Rights by Non-Indians

Defendants contend that the district court abused its discretion in allowing non-tribal-member agents of the Yakama Nation to exercise rights under the Treaty. Defendants do not identify any specific order or provision which

[12] Defendants also note that Dr. Walker's testimony conflicted with what the Nez Perce Tribe had previously written about the Nez Perce Treaty in a book that Dr. Walker had edited.

they challenge. We assume, however, that they contest the court's order that the "Treaty right to travel, although secured to the Yakama Indian Nation, can be exercised by its individual members, and any Yakama-owned and operated corporation or business which is tribally licensed." *Yakama Indian Nation,* 955 F.Supp. at 1260. Plaintiffs explain that some non-Indians were hired by Indians or Indian corporations to drive log trucks, a practice permitted by the Yakama Nation under its Tribal Employment Rights Ordinance (Testimony of Kip Ramsey). As Defendants do not contest the district court's ruling regarding tribal regulatory sovereignty, they have no basis to object to the manner in which the Yakama Nation elects to exercise this right through its employment ordinance. *See United States v. Oregon,* 787 F.Supp. 1557, 1570-72 (D.Or.1992), *aff'd,* 29 F.3d 481 (9th Cir.1994) (treaty rights belong to tribal entities who may administer or regulate the exercise of these rights). There was no abuse of discretion.

V. CONCLUSION

A quest for historical truth is always a difficult undertaking. We are asked to journey back to Walla Walla in 1855 and discern the intentions of two radically different peoples who did not share the same language, culture or values. As the record of this case discloses, scholars have devoted their entire careers to this undertaking and have reached differing conclusions. The district court undertook a careful inquiry into the intentions of the parties at Walla Walla and, given the evidence, its interpretation is certainly plausible. We conclude that the district court's essential findings of fact were not clearly erroneous. On the basis of those findings, we agree with the district

court's interpretation of the Yakama Treaty. Accordingly, the judgment is

AFFIRMED.

APPENDIX I

955 F.Supp. 1229

YAKAMA INDIAN NATION,
Plaintiff/Intervenors,

v.

Juan FLORES, et al., Defendants.

Ronald Cree, Jr., et al., Plaintiffs,

v.

Juan FLORES, et al., Defendants.

WHEELER LOGGING, Plaintiff,

v.

Annette SANDBERG, et al., Defendants,

v.

Federico PENA, United States Secretary of Transportation, Third Party Defendant.

Nos. CS-89-458-AAM, CY-92-3100-AAM.

United States District Court, E.D. Washington.

Feb. 12, 1997.

Timothy R. Weaver, Cockrill & Weaver, Yakima, WA, Elizabeth F.M. Nason, Yakama Nation Office of Legal Counsel, Toppenish, WA, for Cree plaintiffs and Yakama Indian Nation, plaintiff-intervenor.

Jack Warren Fiander, While [sic] Swan, WA, for plaintiff Wheeler Logging.

Fronda C. Woods, Attorney General of Washington, Licensing Division, Olympia, WA, for defendants.

MEMORANDUM OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

McDONALD, Senior District Judge.

Once again the court must determine whether the Treaty With the Yakamas of 1855 (hereinafter "Treaty") precludes the State of Washington from imposing licensing and permitting fees on logging trucks owned by the Yakama Indian Nation or its members. At the summary judgment stage of these proceedings, the court ruled in favor of plaintiff-intervenor Yakama Indian Nation after dismissing the claims of the individual plaintiffs. Ct.Rec. 180. The court found that the phrase "in common with," as interpreted in Treaty fishing cases, applies to the public highways clause of the Treaty, and thus precludes the imposition of truck licensing and permitting fees on Indian-owned trucks. *Cree v. Waterbury,* 873 F.Supp. 404 (E.D.Wash.1994). The Ninth Circuit reversed, holding that the court must engage in a fact-finding inquiry to discern what the parties to the Treaty intended. *Cree v. Waterbury,* 78 F.3d 1400 (9th Cir.1996).

Accordingly, on November 4, 1996, a bench trial commenced in the above-mentioned consolidated actions. Timothy R. Weaver, Cockrill & Weaver, Yakima, Washington, represented the individual *Cree* plaintiffs and plaintiff-intervenor Yakama Indian Nation, and Elizabeth F.M. Nason also appeared on behalf of the Yakama Nation. Jack W. Fiander represented plaintiff Wheeler Logging. Assistant Washington State Attorney General Fronda Woods represented state defendants.

SUMMARY

The Confederated Tribes and Bands of the Yakama Indian Nation (Yakama Nation) and the individually-named plaintiffs[1] in these consolidated actions brought suit seeking a declaration of their rights under Article III, paragraph 1, of the Treaty with the Yakamas, regarding the right of the Yakama Nation and its members to operate vehicles on public highways within Washington state.

Specifically, plaintiffs seek a declaration by the court that Article III, paragraph 1, reserves to the Yakama Nation and its members the right to take tribal goods to market over the public highways of Washington state free from state registration requirements and applicable licensing and permitting fees. However, plaintiffs do not oppose truck registration with the State for purposes of identification. Further, plaintiffs do not seek exemption from weight regulations applicable to Indian-owned logging trucks or from fines issued for non-compliance with those regulations. Rather, plaintiffs argue that the Treaty precludes the State from exacting a fee, either directly or indirectly, for compliance with those regulations. Additionally, the Yakama Nations [sic] seeks a declaration that it has the sovereign authority and Treaty-reserved right to regulate the conduct of its members in exercising the right to travel the public highways without interference by the State.

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[1] Unless otherwise specified, the court refers to all collective plaintiffs, including the Yakama Nation, as "plaintiffs." Additionally, references to Court Records refer to those in *Cree,* CS-89-0458-AAM.

Alternatively, plaintiffs argue that Washington licensing and permitting fees, as currently applied to Indian-owned trucks, are barred by the Supremacy Clause of the United States Constitution because such fees are not prorated for off-reservation use as required under *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), and *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Defendants deny all claims of plaintiffs and assert that the Treaty does not reserve a right to travel the public highways free of applicable licensing and tonnage fees. Additionally, defendants deny that the Supremacy Clause bars the challenged fees and registration.

A. Facts of Dispute

Washington state law requires registration of personal automobiles with an accompanying flat registration and licensing fee. *See* RCW § 46.16.010. Vehicles owned by individual Indians have never been exempt from Washington vehicle registration fees. Since 1915, Washington has required registration and licensing of trucks according to gross weight, with higher weights bearing higher licensing fees. RCW §§ 46.16.070, 46.16.135 (monthly tonnage licenses), 46.44.095 (temporary tonnage permits).[2] Trucks

[2] According to defendants' trial brief, owners of trucks are not required to pay a separate registration fee. Rather, Washington collects a licensing fee based on gross weight. RCW § 46.16.070. However, failure to pay such fees is a violation of RCW §§ 46.16.070, 46.16.135, and 46.16.010, as a truck owner cannot register the vehicle without proper licensing.

(Continued on following page)

owned by individual Indians have never been exempt from such license fees. In addition, Washington requires log tolerance permits for certain overweight trucks with payment of an accompanying fee. RCW §§ 46.44.047, 46.44.095 (temporary tonnage permit). Again, individual Indians have never been exempt from such fees. Washington law establishes traffic infractions for violations of the weight licensing requirements, such as failure to obtain proper licensing and permits, and impose penalties for such violations. RCW §§ 46.16.010, 46.16.135, 46.16.140, 46.16.145. Fees paid to the State of Washington for truck registration, licensing, and log tolerance permits are credited to the state motor fund and used primarily for highway purposes. RCW §§ 46.68.030, 46.68.035.

Plaintiff-Intervenor Yakama Nation sells timber from lands held in trust by the United States for the benefit of the Yakama Nation and its members. Under the supervision of the Bureau of Indian Affairs, the Yakama Nation enters into timber sales contracts with purchasers. When possible, purchasers of tribal timber must employ tribal members. *See* Testimony of Kip Ramsey; P-54 (Stipulated testimony of Delbert Wheeler).

Pursuant to their amended complaints, plaintiffs' challenge the registration requirements pursuant to RCW § 46.16.010, which requires the appropriate licenses before an owner may register a vehicle in the state. Plaintiffs also challenge the requirement that all tribal members must register their trucks with the state as a violation of the Yakama Nation's sovereign authority and Treaty-reserved rights to regulate the conduct of its members both on and off the reservation. Ct.Rec. 219. However, in the parties' joint pretrial order, plaintiffs maintain that they do not challenge registration for identification purchases. Ct.Rec. 294.

Cree and *Wheeler* plaintiffs operate logging trucks that haul logs from tribal timber sales within reservation lands to off-reservation mills. *Cree* plaintiff Richard "Kip" Ramsey is the owner of Tiin-Ma Logging Company. Ramsey began his logging business in 1978 and was the first Indian logger to haul tribal timber off-reservation. The other named *Cree* plaintiffs are employed as drivers for Tiin-Ma and, with the exception of Douglas Beebe, are enrolled members of the Yakama Nation. Delbert Wheeler is the owner of plaintiff Wheeler Logging and is an enrolled Yakama Indian. Wheeler Logging began operations in 1987.

Defendants are officers authorized to issue traffic citations for violations of vehicle registration, licensing and permitting statutes. Plaintiffs brought suit after defendant officers issued traffic citations to Tiin-Ma and Wheeler Logging drivers because Kip Ramsey and Delbert Wheeler neither paid applicable tonnage licensing fees nor obtained log tolerance permits for their trucks. Recently, defendant officers began issuing citations to Tiin-Ma and Wheeler drivers for the failure to possess proper registration. All of the state enforcement actions challenged in this case happened outside the boundaries of the Yakama Indian Reservation.

Plaintiffs claim that the Treaty with the Yakamas protects their right to haul tribal timber to market over state highways without restriction, and therefore the state cannot impose licensing and permitting fees on logging trucks owned by the Yakama Nation or its members. They allege that the officers have deprived plaintiffs of their rights under the Treaty.

B. Procedural History

Cree plaintiffs filed suit against the State of Washington and several of its officers on July 3, 1989. On June 1, 1991, the court granted *Cree* plaintiffs' motion for a preliminary injunction. Ct.Rec. 48. The court enjoined defendants from issuing citations to Tiin-Ma Logging Company or its drivers for violations of the laws of Washington that are based on the failure to obtain tonnage licenses under RCW 46.16.070 or the failure to obtain log tolerance permits under RCW 46.44.047. The court further enjoined defendants from impounding or threatening to impound Tiin-Ma's trucks for similar violations.

On June 17, 1991, the court issued an order granting in part and denying in part defendants' first motion for partial summary judgment. Ct.Rec. 49. The court granted the motion to dismiss all claims against the State of Washington; granted the motion to dismiss all claims for damages against the defendant officers in their official capacities; and granted the motion to dismiss the claims for injunctive relief against former defendant Waterbury as he was no longer employed by the State Patrol. The court denied defendants' motion to dismiss the damages claims against the officers in their individual capacities based on qualified immunity. On appeal, the Ninth Circuit Court of Appeals reversed the court's ruling on qualified immunity. Ct.Rec. 80. The Circuit held that the officers were entitled to qualified immunity because the claimed treaty right was not clearly established at the time the officers issued the citations.

Wheeler Logging filed suit on September 8, 1992. Subsequently, the court granted Wheeler Logging's motion for preliminary injunction. The terms and conditions of the

injunction are essentially identical to those issued in *Cree*. Because the legal issues in the two cases are practically indistinguishable, the court consolidated the cases on March 6, 1993. Additionally, the court granted defendants' motion to join the United States Secretary of Transportation as a third-party defendant. Ct.Rec. 81. However, service was not perfected upon the Secretary until July 1996.

On May 11, 1994, the court ordered the individual plaintiffs to show cause why their claims should not be dismissed pursuant to the Tax Injunction Act. Ct.Rec. 112. After briefing by the parties, the court entered an order dismissing each individual plaintiff's claim challenging the financial obligations under the truck licensing and permitting laws at issue, because the court lacked subject matter jurisdiction under the Act. Ct.Rec. 133. The court then granted the Yakama Indian Nation's motion to intervene as a party-plaintiff in both the *Cree* and *Wheeler* actions.

On November 29, 1994, the court issued an order addressing five summary judgment motions. Ct.Rec. 180; *Cree v. Waterbury,* 873 F.Supp. 404 (E.D.Wash.1994). The court ruled that prior judicial decisions regarding the Yakama Nation's fishing rights under Article III, paragraph 2, of the Treaty governed the meaning of the language "in common with" contained in the public highways clause, Article III, paragraph 1, of the Treaty. Accordingly, the court ruled that the Yakama Nation and its members retained the right to travel Washington public highways without paying highway-user fees while hauling tribal goods. The court also ruled that the Yakama Nation possessed the authority to regulate the conduct of its members in the exercise of Treaty-reserved travel rights

outside of the reservation. Finally, the court found that plaintiffs could not recovery [sic] attorneys' fees under 42 U.S.C. § 1988 because their claims were not cognizable under section 1983.

State defendants appealed the court's ruling on the Treaty interpretation issue. The Ninth Circuit reversed, finding that the court erred in holding as a matter of law "that [the fishing rights cases] *defined* the term "in common with" to mean that no fees could be charged for the exercise of a Treaty right." *Cree,* 78 F.3d at 1403. Instead, the Circuit held that a "factual investigation into the historical context and parties' intent at the time the Treaty was signed is necessary to determine the precise scope of the highway right." *Id.* at 1405. Accordingly, the Ninth Circuit remanded the case to this court for such a factual inquiry.

On remand, individual plaintiffs and the Yakama Nation were given leave to amend their complaints. Plaintiffs essentially added three new claims: 1) that the Treaty With the Yakamas preempts vehicle registration requirements under RCW § 46.16.010; 2) that those registration requirements violates [sic] the sovereign and Treaty-reserved rights of the Yakama Indian Nation to govern the conduct of its members in the exercise of Treaty rights; and 3) that Washington truck license and overweight permit fees fail to meet the standards of *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (*"Colville"*) and *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (*"Moe"*), because the challenged fees are not tailored to account for actual off-reservation travel. Plaintiffs sought to amend their complaints after state

defendants, notwithstanding the preliminary injunctions issued by this court, began ticketing Tiin-Ma and Wheeler drivers for failing to possess proper registration under RCW § 46.10.010. *See* P-9. Proper registration cannot be obtained absent payment of the licensing and permitting fees, and therefore, individual plaintiffs, along with the Yakama Nation, challenge the registration requirements.

The United States Secretary of Transportation was served with *Cree* plaintiffs' Amended Complaint in July 1996. In September 1996, the court granted the parties' stipulated motion for dismissal of the United States Secretary of Transportation as a third-party defendant.

On October 2, 1996, the court denied defendants' Motion for Partial Summary Judgment regarding the vehicle registration claim included in plaintiffs' Amended Complaints. Ct.Rec. 281. The court ruled that the federal heavy vehicle use tax, 26 U.S.C. § 4481, did not abrogate any Treaty right held by the Yakamas to be free from state vehicle registration requirements. Also in October 1996, the parties cross-moved for summary judgment regarding plaintiffs' claims under *Colville* and *Moe*. As the issues in these motions constitute plaintiffs' alternative ground for relief, the court reserved ruling on the motions until a determination of the factual issues.

LEGAL STANDARDS

The Ninth Circuit ruled that this court must "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Cree,* 78 F.3d at 1405. The court first

sets forth the pertinent standard for interpreting treaties with Indian tribes.

According to well-established canons of construction, treaty language must be construed as the Indians would naturally have understood such terms, with doubtful or ambiguous expressions resolved in the Indians' favor. *See United States v. Winans,* 198 U.S. 371, 380-81, 25 S.Ct. 662, 663-64, 49 L.Ed. 1089 (1905); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 676, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979) (*"Fishing Vessel"*); *Tulee v. Washington,* 315 U.S. 681, 684-85, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942). Consequently, courts have adopted a liberal rule of construction with respect to Indian treaties which the Supreme Court has repeatedly relied upon in construing the terminology of Article III of the Treaty. *Fishing Vessel,* 443 U.S. at 676, 99 S.Ct. at 3069 ("This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor").

If the treaty language is unambiguous, a court must construe the treaty in accordance with its plain meaning: "[C]ourts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 774, 105 S.Ct. 3420, 3432, 87 L.Ed.2d 542 (1985) (internal quotes and citations omitted). In other words, if the language of the Treaty – as naturally understood by the Yakamas – is unambiguous, the court need go no further in its analysis. Conversely, if the court finds the language of the Treaty ambiguous, the court must construe such terms in a manner favorable to the Yakamas.

Defendants repeatedly argue that plaintiffs bear the burden of proving that the "parties to the Yakama Treaty intended that the Treaty would preempt state highway-user taxes and vehicle registration laws." State Defendants' Trial Brief at 7. However, according to the canons of construction recited above, plaintiffs need only show that the Yakamas understood the Treaty language to secure their right to travel on the public highways without restriction, thus precluding state registration requirements and licensing and permitting fees for Indian-owned vehicles carrying tribal goods to market.

The Ninth Circuit similarly discarded defendants' argument when it remanded this case for trial:

> The State argues that the Yakamas bear the burden of proving a tax exemption in the Treaty. However, in interpreting a treaty between the United States and an Indian tribe, the court must interpret the treaty "in the sense in which [the treaty] language would naturally be understood by the Indians." *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n ("Fishing Vessel"),* 443 U.S. 658, 675-76, 99 S.Ct. 3055, 3067, 61 L.Ed.2d 823 (internal quotation marks omitted). Treaties are "broadly interpret[ed]" in the Indians' favor. *Id.*

Cree, 78 F.3d at 1403. Even so, defendants are partially correct in that the canons of construction do not shift the burden from plaintiffs to defendants for the purpose of showing how the Treaty was understood by the Yakamas. Nevertheless, in construing the Treaty, the court is required to examine the language of Article III, paragraph 1, as such terms were understood by the Yakamas.

EVIDENCE OF PARTIES' INTENTIONS

In determining the intent of the parties to the Treaty, the court considered the testimony of three expert witnesses presented by plaintiffs and defendants. Additionally, the court heard the testimony of Kip Ramsey, Delbert Wheeler (P-54), and two state employees, one from the State Department of Transportation and one employed as a terminal audit manager for the Washington State Patrol. Finally, the court reviewed the exhibits identified in Appendix II of this Opinion. In light of the court's findings and conclusions, the court finds it beneficial to describe the backgrounds of the pertinent expert witnesses.

William Yallup, a full-blood Yakama Indian, testified on behalf of the plaintiffs. Mr. Yallup was born in 1926 in Ellensburg, Washington, and raised mostly in Toppenish, Washington, by his paternal grandparents. Yallup testimony at p. 6. He also spent time with his grandfather in Rock Creek, Klickitat County. Mr. Yallup's ancestors, including his grandparents and parents, were members of tribal bands comprising the Yakama Nation. Mr. Yallup speaks Yakama, Nez Perce, and some Umatilla language. *Id.*

Mr. Yallup was taught the meaning of the Treaty by his grandparents. Three ancestors of Mr. Yallup signed the Treaty, including two of the three primary chiefs that spoke on behalf of the Yakamas at the Treaty negotiations, Kamiakin and Skloom. *Id.* at p. 6; P-2 at p. 34. Mr. Yallup testified that his grandfather knew Kamiakin and Skloom and others who were present during the treaty negotiations. Mr. Yallup was twenty-eight years old when his grandfather died. Yallup testimony at p. 6.

Mr. Yallup has served almost continually on the Yakama Nation Executive Committee for the past 25 years. From 1985 to 1990, he served as the Director and Cultural Specialist of the Committee.

Dr. Deward Walker also testified as an expert on behalf of plaintiffs. Dr. Walker possesses a Ph.D. in anthropology, the comparative study of past and present human cultures.[3] Specifically, Dr. Walker is an expert in ethnology, characterized as the comparative interpretation of cultures based on their history, structure, and functioning. Walker testimony at 3. Dr. Walker has spent his career studying the culture of Native American tribes, particularly those of the Northwest Plateau. *Id.* at p. 5. Plaintiffs submit that Dr. Walker is the "premier expert" on the ethnohistory and anthropology of the Plateau Tribes, which comprise the tribes between the Cascade and Rocky Mountains and include the Yakama Nation. *Id.* at p. 7.

According to Dr. Walker, the basic goal of anthropology is to understand a particular culture, such as that of a Native American tribe, through direct participation. Dr. Walker explained:

> As part of that one then needs to acquire understanding of the language, of the history, of the social institution, of the lives of key individuals, to include such things as leadership. We need to

[3] The curriculum vitae of Dr. Walker was admitted as evidence during trial and thoroughly describes Dr. Walker's education and accomplishments.

> understand in a rounded full sense as much of the culture of an operating system as possible.

Walker testimony at p. 8. Dr. Walker first began working with the Yakama tribe in the 1950s and has written several publications about the Plateau Indians which indirectly relate to the Yakama Indians. Over the years, Dr. Walker has worked with several members of the Yakama Nation, including a cultural historian. *Id.* at p. 10.

Dr. Kent Richards, a professor of history at Central Washington University, testified on behalf of state defendants.[4] Trained as a historian, Dr. Richards has written extensively on Isaac I. Stevens, the Territorial Governor of Washington at the time of the Treaty. In the context of this proceeding, Dr. Richards was asked to

> look at the Yakama Treaty in the context of U.S. Indian policy at that time in the mid 19-th century, and in the context of previous treaties, particularly to look at that clause in the treaty relating to roads, and to look at the way that that clause was carried out and interpreted after the treaty.

Richards testimony at p. 6. In formulating his opinions, Dr. Richards almost exclusively consulted written sources; he did not speak with any Yakama tribal members. Instead, Dr. Richards relied upon primary sources generated by a participant or an observer at or near the time of Treaty negotiations. *Id.* at p. 7.

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[4] As with Dr. Walker, Dr. Richard's curriculum vitae reciting his credentials was made a part of the record.

With all due deference to the experience and impressive credentials of Dr. Walker and Dr. Richards, the court considers Mr. Yallup the ultimate expert in this proceeding. From his early childhood, Mr. Yallup was taught the meaning of the Treaty, as understood by the Yakamas, through oral history passed down through the generations. Further, Mr. Yallup has been entrusted with the role of preserving the cultural history of the Yakamas. Therefore, the court views his testimony with considerable respect.

The court thus proceeds to the factual inquiry mandated by the Ninth Circuit.[5]

A. *Treaty With the Yakamas of 1855*

Article III of the Treaty with the Yakamas of 1855 provides:

> *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways.
>
> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said

[5] Although the court sets forth its overall findings and conclusions in the form of a memorandum opinion, the court hereby incorporates the numbered findings of fact and conclusions of law recited in Appendix I of this Opinion.

> confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Mr. Yallup testified that members of the Yakama Nation view the Treaty as a sacred document. Mr. Yallup's early education of treaty rights involved a religious approach to rights reserved by the Treaty, specifically how the Treaty provisions pertained to the religious conduct of the tribe. Yallup testimony at p. 9. Particularly, the teachings by Mr. Yallup's grandfather involved the manner in which the future religious practices of the tribe should be conducted with respect to rights reserved by the Treaty. *Id.* at pp. 9-10.

Dr. Walker confirmed this sacrosanct view of the Treaty:

> The treaty is, in a way, a founding document. It is like a beginning point in the modern government, you might say, of the Yakama, in that they see this as something that is sacred, it needs to be observed, that it was entered into in good faith, and whose provisions need to be protected at all costs.

Walker testimony at p. 12. Dr. Walker has observed this attitude consistently in working with the Yakama Nation. *Id.* Clearly, the importance of the Treaty language to the Yakamas cannot be understated. The Treaty embodies spiritual as well as legal meaning for the tribe; it enumerates basic rights secured to the Yakamas that encompass

their entire way of life. Thus, each provision in the Treaty, including Article III, paragraph 1, has special meaning.

Yet, in order to fully understand how the Yakamas understood Article III, paragraph 1, at the time the Treaty was signed, an examination into the historical context of the Treaty, including the significance of travel to the Yakamas, is essential.

B. Historical Context of the Treaty

1. Significance of Travel

Prior to the signing of the Treaty, the Yakamas traveled extensively. This far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture. Travel was significant for many reasons, including trade, subsistence, and maintenance of religious and cultural practices. Travel was such an essential component of the Yakamas' way of life that "they could not have performed and functioned as a distinct culture in the pla[ne] in which they performed and functioned without extensive travel." Walker testimony at pp. 13-14; *see also* Richards testimony at p. 12.

Travel was particularly important for the purpose of trade. A network involving the exchange and interchangeability of goods and services existed between Indian tribes of the Northwest and surrounding areas, and the Yakamas were a central part of the network due to their location between Northwest Coast tribes to the west and the Plains tribes to the east. Yallup testimony at pp. 13-14; Walker testimony at pp. 14-15. Within this network, the Yakamas traded goods, such as dried salmon, at various tribal trade centers throughout the Northwest and beyond. P-5; P-21, D-329; Walker testimony at pp. 13-18.

The Yakamas' way of life depended on goods that were not available in the immediate area; therefore, they were required to travel to the Pacific Coast, the Columbia River, the Willamette Valley, California, and the plains of Wyoming and Montana to engage in trade. Walker testimony at pp. 14-15; Richards testimony at p. 12; P-4, P-5. Additionally, trading was constant between the fourteen bands of tribes that comprise the Yakama Nation. Yallup testimony at p. 22. Finally, Yakama Indians traded goods with non-Indians as whites expanded trading centers into the region, specifically those of the Hudson's Bay Company. P-6-8; P-14, D-218 at pp. 25-27.

Goods that Yakamas traded included fir trees, pumice-like lava rocks, horses, and most importantly, salmon. Yallup testimony at pp. 12-15. The Yakamas traded these items for goods such [sic] buffalo products, especially buffalo hide and dried buffalo meat. *Id.* at pp. 13-14. Finally, the Yakamas traded goods obtained from the Plains Indians for items from the coastal tribes. From the coastal tribes, the Yakamas primarily sought shellfish, which was significant for cultural as well as subsistence purposes. *Id.* at p. 21.

Bands that comprise the Yakama Nation, particularly the Klickitats, had a well-known reputation for being "inveterate traders." Walker testimony at p. 16; P-14, D-218 at p. 9. George Gibbs, a lawyer, ethnologist, and advisor to Isaac Stevens, remarked that their proclivity for trade was equal to that of whites, as the Yakamas constantly moved goods back and forth between the Coast and Interior and obtained access to goods from the Plains. Walker testimony at p. 16; P-14, D-218. Gibbs reported that the Klickitats exhibited a "peculiar aptitude" for trading, "purchasing from the whites feathers, beads,

cloth, and other articles prized by Indians, and exchanging them for horses, which in turn they sell in the settlements." P-14, D-218 at p. 9. He noted that tribal women would collect and dry food abundant in the Klickitat region, such as berries, and trade the same for foodstuffs unavailable in their territory. *Id.* at p. 10.

The Yakamas' system of trade and exchange was also religiously significant. Some items not readily available to the tribe, such as crabs and other types of shellfish, were of vital religious and ceremonial importance. Yallup testimony at p. 21. Obtaining an adequate supply of such indispensable goods without giving up those in need of constant replenishing was considered desirable in the Yakamas' religion, as well as economically beneficial to the tribe. Therefore, propitious trading was considered "the art of survival." *Id.* at p. 22; Walker testimony at p. 17.

Yakamas also traveled for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes. Walker testimony at p. 20; P-14, D-218; P-15, D-344. For example, the Yakamas, along with other Plateau tribes such as the Nez Perce, traveled to the buffalo grounds in the eastern plains to hunt with the Flathead tribes during the late spring and summer months. P-15, D-344 at p. 5; Yallup testimony at p. 18. These hunting trips would be very organized and include goods for trade in the area. Walker testimony at p. 21. Additionally, the Yakamas communicated continually with Puget Sound tribes during the summer months by travel through the mountain passes.

Further, within the plateau area itself, travel was required to obtain various foodstuffs and game. *Id.* at p. 17. Typically, after planting potatoes in late spring, the

Yakamas would leave for the mountains to dig for roots. P-15, D-344 at p. 5. Some tribal members would then travel to the rivers to fish for spring salmon, while others would remain in the mountains throughout the berry season. *Id.* In the autumn, the Yakamas would gather their store of berries and return to the rivers for fall fishing. *Id.* Shortly afterward, the buffalo hunters returned from the Plains, where they had remained since the previous fall or spring. P-14, D-218; P-15, D-344 at p. 5. At the first snow, Yakama hunters would return to the mountains for deer, elk, and other game. Finally, during the harsh winter months, the Yakamas were driven to the straits to survive the weather. P-14, D-218 at p. 15.

Travel was essential with respect to the Yakamas' custom of taking fish. Tribal members would travel to the Columbia River to intercept the early runs of salmon, then follow the runs as they moved through Yakama territory and beyond. Yallup testimony at p. 11; Walker testimony at p. 17. In furtherance of their fishing practices, the Yakamas maintained fisheries at The Dalles and other locations on the Columbia River. P-14, D-218 at p. 13. Therefore, travel to these areas was absolutely necessary for the Yakamas to maintain their fishing practices.

Travel for fishing purposes is particularly significant when considering how fish, notably salmon, are woven into the fabric of Yakama life. Fishing was and remains of paramount importance to the tribe. It has been estimated that as much as fifty percent of the Yakamas' diet depended on fish and constituted a primary staple. Walker testimony at p. 19. The Yakamas also used salmon for religious and ceremonial practices in which every part of the fish played a role. Further, several species of salmon

were used for various medicinal purposes. Yallup testimony at pp. 10-12. Finally, as described above, fish was especially valuable in trading with other tribes for goods and services. Salmon was particularly prized by tribes such as the Crow and Flathead who did not have access to salmon in their territories. *Id.* at pp. 10-11; Walker testimony at pp. 19-20. Thus, the ability to take fish, which depended on the ability to travel, played a dominant role in Yakama life.

Additionally, travel was important to maintain cultural ties with families. The usual custom of the Yakama men was to seek wives in adjoining tribes, resulting in much intermarriage with tribes on the western side of the Cascades, as well as with tribes to the north. P-14, D-218 at pp. 17-18. Travel enabled the children of such unions to learn the culture of both sides of their families. Yallup testimony at p. 24. In this way, the culture of each band was maintained through the generations. *Id.*

The record as a whole unquestionably depicts a tribal culture whose manner of existence was ultimately dependent on the Yakamas' ability to travel. Significantly, Stevens knew of the Yakamas' reliance on travel when entering into Treaty negotiations. Walker testimony at p. 22; P-14, D-218; P-15, D-344. For example, George Gibbs had reported that the tribes "require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large; but they do not need the exclusive use of any considerable districts." P-14, D-218 at p. 29. Stevens' knowledge of the importance of travel is further illustrated by the promises given to the Yakamas during the Treaty negotiations regarding their ability to travel off-reservation. *See, e.g.,* P-2 at p. 67 ("You

will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites.").

2. Pre-Treaty Contacts

The Yakamas' contacts with whites began many years prior to Treaty, resulting in native use of horses and firearms. Richards testimony at p. 9. After the Lewis and Clark expedition in the early 1800s, the Yakamas experienced increased contact with explorers and fur traders, predominantly those with the Hudson's Bay Company. *Id.* at pp. 12-13; P-14, D-218 at p. 11. Additionally, the Yakamas had frequent interaction with Catholic priests who resided at the Ahtanum Mission in the Yakima Valley. Richards testimony at p. 15; P-14, D-218 at p. 13. The first white settlers in the Northwest arrived in 1840s in Oregon's Willamette Valley. Few settlers were present in the Yakima Valley in 1855, although the lands west of the Cascade Mountains were rapidly becoming settled by whites. Richards testimony at p. 16. Thus, until the early 1850s, the Yakamas' contact with whites was mostly limited to encounters with explorers, traders, and missionaries.

During the Treaty negotiations, Isaac Ingalls Stevens was the Territorial Governor of the Washington Territory and also served as Superintendent of Indian Affairs for Washington Territory. Richards testimony at p. 23. At the same time, Stevens was Chief Engineer of the Northern Division of the Pacific Railroad Surveys chartered by Congress to ascertain the most expedient transcontinental railroad route. *Id.* at p. 24; P-14; D-218.

Stevens was under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory. United States policy at the time favored settlement of the Northwest by whites, and the government sought to avoid hostilities between whites and Indians. *See* D-204-214 (treaties between the United States and other tribes); D-216. The increased migration of settlers to the Washington Territory only intensified the necessity to free land for settlement. The Oregon Donation Act, passed by Congress in the 1850s, allowed settlers to take lands in areas that were still occupied by tribes but had not been ceded to the United States. D-215; D-216. The Act contributed to the pressure placed on Stevens to obtain title to Indian lands as emigrants were attempting to enter the Yakima Valley and take up settlements. Richards testimony at pp. 23-24.

Further, Stevens and other government officials envisioned the construction of wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades. D-216; D-334 (letter from Stevens to J. Patent Anderson, territorial marshal, advising him to work with prominent citizens in building road across Cascades over Naches Pass). Finally, as with other eastern Washington tribes, Stevens was prompted to extinguish Yakama title to land, or obtain a right of way through Yakama land, for the purpose of constructing a railroad route through the Cascade mountains to Puget

Sound.[6] D-216. Accordingly, the Yakamas were considered of great importance to Stevens and the United States "from their occupying the country traversed by the Military and emigrant trial from Walla Walla to Puget Sound." P-15, D-344 at p. 1.

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[6] In a report to the Senate Chairman of the Committee on Indian Affairs, the Commissioner of Indian Affairs stated that it was now favorable to enter into treaties with tribes:

> With many of the tribes in Oregon and Washington Territories, it appears to be absolutely necessary to speedily conclude treaties for the extinguishment of their claim to the lands now or recently occupied by them.
>
> The policy of the government has favored emigration to, and settlement within those territories, by citizens of the States; and, in consequence, they have been and are rapidly filling up with white settlers; yet the Indian tribes still claim title to the lands on which the whites have located, and which they are now cultivating. The jealously which has resulted from this state of things has naturally led to repeated hostilities, resulting in severe suffering, and, in some instances, the murder of the white settlers, and in hindering the general growth and prosperity of the civil communities of these Territories. Unless something more effectual and definite be done speedily, it is probable that hostilities will be resumed by the Indians in Oregon on a more extended scale, and engaging a larger and better organized body of Indians than the settlers there have heretofore contended with.
>
> The increase of the annual overland emigration to the Pacific coast, and the desirableness of increased facilities for its speedy and safe transit, have brought to the notice of the public various projects for the construction of railroads from various points on the western frontiers of the States to different points on the Pacific, and the prospect that one or more railroads may eventually be constructed, renders it peculiarly proper that all hostile Indian tribes or bands along such routes be permanently pacified.

D-216 at pp. 1-2.

Thus, obtaining Indian lands east of the Cascades became a central objective in Stevens' career. In his address to the first session of the Washington legislature, Stevens declared his aspiration to extinguish Indian title to land for the purpose of constructing roads and a railroad route through the Territory. D-291; Richards testimony at 24. Stevens surmised that if he attained the right to build a road through Washington Territory to Puget Sound, the Territory would likely receive more federal funds for additional road-building projects. D-334; Richards testimony at 24.[7] In pursuit of his goals, Stevens employed Captain George McClellan, Andrew Bolon, and James Doty, who each visited the Yakamas prior to Treaty negotiations. Richards testimony at p. 46.

McClellan was a commanding officer of the Western Division of the Pacific Railroad Exploration. P-14, D-218. In 1853, McClellan was sent to investigate possible routes for a wagon trail and railroad through the Cascades. P-14, D-218; P-17, D-335; P-15, D-344 at p. 22; Richards testimony at 46. To that end, McClellan conversed with several members of Eastern Washington tribes. Although McClellan did not consider it necessary to enter into formal talks with many of the tribes, the situation with

[7] Apparently, Stevens was also motivated by the natural resources available in Eastern Washington. In a letter a year before the Treaty negotiations, Stevens remarked, "There is much valuable land and an inexhaustible supply of timber east of the Cascades. I consider its speedy settlement so desirable that all impediments should be removed. . . ." Darrell Scott, Editor, *A True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley 1855,* pp. 7-8 (Official Proceedings). Stevens also learned, prior to the Treaty negotiations, that gold had been discovered in Eastern Washington. *Id.*

the Yakamas was viewed differently: "Their country was to become a thoroughfare for the whites, and it was very important that a proper impression should be made, and a friendly understanding established." P-14, D-218 at p. 16.

During his visit, McClellan met with Yakama Chief Kamiakin and "explained to him the general nature of the American government, as far as was necessary for him to understand, and the rank that Governor Stevens ... would hold in the country." *Id.* McClellan advised Kamiakin of the government's intention to build a wagon road and railroad across the mountains and informed Kamiakin that many whites would pass through Yakama country. *Id.* McClellan further expressed the wish that Kamiakin would assist the government in that endeavor, explaining that the travel of whites through Yakama country would greatly benefit Yakama trading enterprises. *Id.*; P-17, D-335 at p. 4. After spending several weeks with the Yakamas, McClellan departed and informed Yakama leaders that Stevens would be coming in the next year or so to discuss a treaty with the Yakamas. Richards testimony at p. 48.

Andrew J. Bolon met with Yakama leaders approximately one year later. Bolon was appointed by Stevens as an Indian agent for Eastern Washington. Richards testimony at p. 49. The purpose of his visit was to prepare eastern Washington tribes for a treaty conference in more specific terms than McClellan had. *Id.* at p. 50. Accordingly, Bolon indicated the intent of the government to pursue the "occupation of [Indian] territory by the whites." P-15, D-344 at p. 2.

In his report to Governor Stevens, Bolon noted that the Yakamas were "a proud and spirited race," different

than coastal tribes, in that they were "ready to resist injustice or oppression." P-15, D-344 at p. 5. In fact, the distrust by one Yakama Chief was so great that he would not accept gifts from Bolon for fear it would create a lien on Yakama lands. *Id.* at p. 1; *see also* P-14, D-218 at p. 16; P-17, D-335. This distrust apparently resulted from occurrences in Oregon where gifts were given to Indians upon negotiations of treaties subsequently repudiated by the whites even though the lands remained in the possession of settlers. P-15, D-344 at pp. 1-3. Therefore, according to Bolon, "It will be of greatest importance that any treaties made with [the Yakamas] be not rejected or their engagements left unfulfilled" by the government. *Id.* at pp. 5-6; Richards testimony at p. 51.

In August 1854, Stevens and General Palmer, Superintendent of Indian Affairs for the Oregon Territory, were instructed to

> enter at once upon [treaty] negotiations, commencing with those tribes in the vicinity of the settlements of the whites, and having for a principal aim the extinguishment of the Indian claim to the lands, and the concentration of all the tribes and fragments of tribes on a few reserves of limited extent, naturally suited to the requirements of the Indians, and located, as far as practicable, so as not to interfere with the settlement of the Territories respectfully. They [a]re admonished of the importance, also, of adopting but few stipulations to be fulfilled on each behalf, which should be simple and well understood by the Indians . . . .

D-220; *see also* D-343.

Subsequently, James Doty visited the Yakamas in early April of 1855, several weeks before the commencement of treaty negotiations. Doty accompanied Stevens on the railroad surveys and assisted Stevens in prior treaty negotiations. Richards testimony at 53. Doty, along with Bolon, attempted to explain the treaty process and the major tenets of a treaty. *Id.* Doty described the major provisions of the treaty as follows: the government would purchase all of the Indian country with some lands reserved to the Yakamas upon which no white man could enter without consent of the tribe or their Indian Agent; Indian horses and cattle would be allowed to graze outside of reservation on lands unclaimed by settlers; the government would provide buildings, a schoolhouse, a blacksmith, a carpenter shop, and mills; and the Yakamas "would have the right of traveling through the country upon lawful business, fishing at accustomed places in common with the whites, and going to the mountains for berries, always provided that they were to remain upon their Reservation when required." P-24, D-348 at pp. 18-19.

Due to the ever-increasing presence of whites, the Yakamas thought that a treaty was inevitable and wanted to "strike the best deal possible." Walker testimony at p. 37.

It was within this context that treaty negotiations occurred between members of the Yakamas and Governor Stevens on behalf of the United States government.

C. Treaty Negotiations at the Walla Walla Council

The parties agree that the Treaty minutes accurately replicate what Stevens and General Joel Palmer told the

Yakamas at the Treaty negotiations. See P-2.[8] The parties further agree that Article III accurately reflects the statements made during the negotiations as reported in the Treaty minutes. P-1; *see,* Dr. Richards testimony at p. 126. Therefore, no issue regarding the substance of what was communicated to the Yakamas by Stevens and his agents is raised.

The Treaty proceedings, commonly known as the Walla Walla Council (Council), commenced in the Walla Walla Valley in southeastern Washington Territory. On May 24, 1855, tribes began arriving at the Treaty grounds. The parties to the Treaty first met on May 28, 1855, to make preliminary arrangements, and the Council formally opened on the afternoon of May 29, 1855. P-2 at p. 29. In attendance of behalf of the United States were Governor Stevens, General Palmer, James Doty, and other Treaty officers. *Id.* Additionally, approximately fifty citizens were present, bringing the total of non-Indians to approximately sixty. *Id.* Chiefs from the Yakama, Nez Perce, Walla Walla, Cayuse, and Umatilla tribes attended, in addition to approximately 1800 tribal members. *Id.* The principle leaders speaking on behalf of the Yakamas were Kamiakin, Owhi, and Skloom. *Id.* at p. 34.

Several interpreters were also present during the Council to translate for the parties. English words were translated into Chinook jargon for the tribes, although that was not the primary language of any tribe. Walker

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[8] Although the parties have submitted the Treaty and the official treaty proceedings as joint exhibits and as plaintiffs' exhibits, the court refers to the Treaty as P-1 and the minutes of the Treaty proceedings as P-2 for simplification.

testimony at pp. 38-40. The tribes agreed to the selection of the interpreters, with a Cayuse chief remarking: "We know of no others whom we would wish. There may be some words hard for them to make us understand, but we think the arrangement good as it is." P-2 at p. 35.

Stevens began the formal negotiations by expressing the government's desire to better the lifestyle of tribal members and assure peace:

> We told the Great Father, these men have farms. The Great Father said I want them to have more and larger farms. I told him you had cattle and horses. He answered that he wanted your horses and cattle to increase. I told him some of your grown people could read and write. He answered, I want all the grown people and all the children to learn to read and write. I told him that some of you were handy at trades. He answered that he desired to give all who choose the means to learn these trades.

Id. at p. 39.

Further, Stevens declared a resolution to protect the Indians from "bad white men" if the tribes agreed to live within designated reservations, explaining that "when the white man and the red man lived together in the same ground the white man got the advantage and the red man passed away." *Id.* at p. 40. Consequently, "[o]n each tract [of land] we want an agent to live who shall be your brother and who shall protect you from bad white men." *Id.* at p. 41. Thus, it was communicated to the tribes that whites and Indians should not occupy the same territory and that the tribes would be protected from unlawful white men by living on the reservations. As Palmer stated:

> Who can say what is mine and what is yours? The white man will come to enjoy those blessing with you. What shall we do to protect you and preserve peace? There are but few whites here now. There will be many. Let us, like wise men, act so as to prevent trouble.
>
> * * *
>
> We did not come here to scare you or to drive you away, but we came here to talk to you like men, and to make such arrangement as to preserve peace and protect you. Our agents have tried to protect you in all your rights. But I am fearful they will not always be able to do so if you continue to live in this scattered condition.

P-2 at pp. 52-53; *see also Id.* at p. 49 ("All experience we have had with Indians these three hundred and sixty years shows us that the white man and the red man cannot live happily together.").

As further incentive to sign the Treaty, Stevens guaranteed the tribes that, in exchange for the tribes' acquiescence in living on a specific tract of land, each reservation would include a blacksmith, a carpenter shop, a saw mill, a grist mill, along with an Indian agent to protect them from "bad white men." *Id.* at p. 41. Palmer guaranteed that "[i]f we make a treaty with you and our Great Chief and his council approves it, *you can rely on all its provisions being carried out strictly.*" P-2 at p. 55 (emphasis added).

Contrary to defendants' assertion that the Yakamas' right to travel was not a component of treaty negotiations, the subject was repeatedly broached, most often by Stevens or Palmer. For example, on May 31, 1855, Stevens told the tribal members present:

> We do not want you to agree not to get roots and berries and not to go off to the buffalo. We want you to have your roots and to get your berries, and to kill your game. We want you if you wish to mount your horses and go to the Buffalo plains, and we want more; we want you to have peace there.

Id. at p. 44. Thus, as explained to the Yakamas, entering into the Treaty would not infringe upon or hinder their tribal practices. Rather, the Treaty was presented as a means to preserve Yakama customs and prevent further encroachment by white settlers, while at the same time providing tribes with modern accoutrements to enhance their standards of living and fortify their resources.

Stevens also explained the reservation boundaries that the government intended to create, including those of the Yakama reservation. As justification for selecting the reservations sites, Stevens related:

> There is plenty of Salmon on these Reservations, there are roots and berries, there is also some game. You will be near the great road and can take your horses and your cattle down the river and to the Sound to market. Though near to the great roads, you are a little off from them, and you will not be liable to be troubled by travelers passing through.

Id. at p. 64. Stevens further explained to tribal members that:

> You will be allowed to pasture you[r] animals on land not claimed or occupied by settlers, white men. *You will be allowed to go on the roads to take your things to market, your horses and cattle.* You will be allowed to go to the usual fishing

> places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites. *All that outside the reservation.*

Id. at p. 67 (emphasis added).

With regard to the Yakama Reservation specifically, "[tribal members] shall have the same liberties outside the reservation to pasture animals on land not occupied by whites, to kill game, to get berries and *to go on the roads to market.*" P-2 at p. 69 (emphasis added). Neither Stevens nor his agents mentioned any sort of restriction on these rights, other than the condition that the United States government be allowed to construct wagon roads and a railroad route through the reservation. As General Palmer asserted:

> My brother has stated that you will be permitted to travel the roads outside the reservation. We have some kind of roads which perhaps you have never seen. We may wish to make one of the roads from the settlements east of the mountain to our settlements here. They may desire to run that road through your reservation. If we desire to do so we wish that privilege. That kind of road we call a rail road. . . . Now if our chief desires to construct such a road through your country, we want you to agree that he shall have the privilege. You would have the benefit of it as well as the other people.
>
> * * *
>
> Now as we give you the privilege of traveling over roads, we want the privilege of making and

> traveling roads through your country, but whatever roads we make through your country will not be for your injury.

Id. at pp. 70-71.

Nearing the end of treaty negotiations, Stevens told the tribes: "You will not be called according to the paper to move on the reservation for two or three years. *Then is secured to you your right to fish, to get roots and berries and to kill game.*" *Id.* at p. 98 (emphasis added). Finally, when trying to convince Nez Perce Chief Looking Glass and others to agree to the Treaty provisions, Stevens reassured them that in this reservation settlers cannot go, that [each tribal member] can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and can [sic] to the buffalo *when he pleases,* that he can get roots and berries on any of the lands not occupied by settlers.

Id. at p. 102 (emphasis added).

Although Chief Kamiakin expressed some reluctance to the Treaty, he ultimately agreed based on Stevens' and Palmer's representations, declaring: "I have been afraid of the white man. Their doings are different from ours. Your chiefs are good. Perhaps you have spoken straight, that your children will do what is right. Let them do as they have promised." P-2 at p. 59.[9]

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[9] Chief Owhi expressed anguish over the decision, evidencing the seriousness with which the Yakamas considered the treaty negotiations: "What shall I do? Shall I give the lands that are a part of my body and

(Continued on following page)

Thus, in reliance on the promises given by Stevens and Palmer, the Yakamas agreed to the Treaty provisions in good faith on June 9, 1855.

D. Actions of the Parties Since Treaty

The Ninth Circuit also instructed this court to examine the actions of the parties since the signing of the Treaty to determine what the parties intended in Article III, paragraph 1.

It is well-documented that the Yakamas traveled extensively prior to the Treaty negotiations. *See supra* pp. 1238-1239. Further, according to reports of the Yakama Indian Agency, Yakama Indians continued to travel off-reservation years after the treaty was negotiated and ratified. *See, e.g.,* D-223 (unless government can "induce them to give up rambling habits, choose a fixed habitation, and become tillers of the ground," Yakamas will not prosper). For example, the Yakamas traveled to hop fields to pick hops or into the mountains for root and berry-gathering during the summer months and would not return until the late fall. P-31, D-241 at p. 386. Yakamas also continued to travel off-reservation for hunting purposes. P-30, D-237; *see also* P-44, D-250.

Most importantly, Yakamas continued to travel off-reservation to fish: "Each year several bands of Indian [sic] on the reserve, and also non-reservation Indians, travel to the salmon fisheries on the Columbia River,

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leave myself poor and destitute? Shall I say I will give you my lands? I cannot say." P-2 at p. 82.

where they have been accustomed to obtain a food supply of fish to last them all winter." P-28, D-235 at p. 291; *see also* P-26, D-224 at p. 581; P-47 (noting large numbers of Yakamas engage in salmon fishing on the Columbia, drying large quantities of fish to be used as winter food); P-26, D-224; D-520.

With respect to the precise right at issue in this litigation, little evidence is presented regarding the Yakamas' understanding of the claimed right to be free from state registration requirements and permitting and licensing fees when hauling tribal goods to market. However, the court reviews the actions it considers relevant.

Yakamas traveled Washington state's public roads and highways without charge until the state began enacting statutes which imposed licensing and permitting fees. Apparently, 128 automobile licenses were issued to Indian-owned automobiles in 1932. P-47, D-451. However, it was estimated that on-reservation Indians owned approximately 500 automobiles at that time. *Id.* Currently, the Yakama Nation requires personal vehicles to be licensed according to Washington state law. D-280 (Yakama Nation Law and Order Code, section 50.01.01), *cf.* D-277 (tribal member stating that he had never purchased vehicle without paying for license).

Evidence suggests that the Yakamas voiced objections to roads built through the reservation without tribal approval. P-32; Yallup testimony at pp. 54-55. Further, the record reveals that the Yakamas objected to state-proposed financing and construction of a highway through the Yakama Indian Reservation in 1932. One proposal was to make gross expenditures a reimbursable charge against

the Yakama Nation. However, "[t]he Yakima Indians, while anxious for the construction to proceed, vehemently protest any appropriation being made that would result in a reimbursable charge against the present or future assets of the tribe." P-45, D-450.

Finally, individual plaintiffs involved in this case have brought suit previously in federal and state court challenging the state's imposition of licensing and permitting fees for their logging trucks. *See* P-51 (Findings of Fact and Conclusion of Law in *Abraham Beebe, et al., v. Don Lewis,* No. C-81-657-RJM (E.D.Wash.1982)); P-52 (Findings of Fact and Conclusions of Law in Order Dismissing Charges as a Matter of Law in *State v. Cree,* No. TI87-4863299 (Dist.Ct.Wash.1988) and *State v. Dalton,* No. TI87-4836800 (Dist.Ct.Wash.1988)); and P-53 (Memorandum Opinion in *State v. Tiin-Ma Logging Co. and Joseph Yallup,* Nos. 5589349, 5589350, 5597156 (1989)).

In each case, a court found that Washington truck licensing and permitting fees violated plaintiffs' Treaty rights and ruled that the Treaty prohibited the state from imposing such fees against tribal members. Yet, the state continued to impose those fees until this court issued preliminary injunctions in the instant litigation.

Having reviewed the relevant factual circumstances, the court proceeds to its discussion of plaintiffs' claims.

TREATY CLAIM

Plaintiffs argue that the Treaty language, along with the promises made to the Yakamas at the Walla Walla Council, unambiguously reserves to the Yakamas the right to travel the public highways without restriction, and

therefore precludes the state from imposing registration requirements and licensing and permitting fees on Indian-owned trucks hauling tribal goods to market.

Defendants counter that the parties to the Treaty did not intend any such exemption from state fees. Defendants first argue that neither party to the Treaty expressed an intention to preserve the Yakamas' traditional system of trade and exchange, and therefore no right to travel without restriction was reserved by the Treaty. Further, defendants claim that even if such a right was retained by the Treaty, that right does not extend to plaintiffs' logging trucks, because logging is a modern "Euroamerican" enterprise. Defendants maintain that the Yakamas' actions before and after the Walla Walla Council exhibit such an understanding on the part of the tribe. Finally, defendants contend that even if the Yakamas retained a right to travel the public highways free of restriction, the truck licensing and permitting fees do not violate the Treaty because they are necessary to preserve the public highways. *See* State Defendants' Trial Brief at 10.[10]

A. The Meaning of "In Common With"

Article III, paragraph 1, of the Treaty With the Yakamas secures to the Yakamas "the right of way, with free access from the [reservation] to the nearest public highway" and "the right, in common with the citizens of the United States, to travel upon all public highways." Although the Treaty first references the right of free access

[10] Actually, defendants' do not explicitly make this argument; however, the court infers this contention from language in their brief.

from the reservation to the nearest public highway, the court finds most critical the language securing to the Yakamas the right to travel the public highways "in common with" citizens of the territory.

Notably, the Treaty does not include a restriction on the Yakamas' right to travel; rather, it *secures* a right to travel. However, the Treaty language does not define the scope of the right to travel or the precise meaning of "in common with." Nor was a precise interpretation given for the term "in common with" during the Walla Walla Council. Walker testimony at p. 24. The only reference to such commonly held rights is Palmer's discussion of the railroad that the federal government wished to build through the reservation. In explaining the railroad, Palmer stated: "You would have the benefit of it as well as the other people." P-2 at 70. Finally, no term in Chinook jargon is the equivalent of this phrase. *See* P-55; P-56. Neither party presented evidence suggesting that "in common with" was ever explained to the Yakamas.

The evidence, or lack thereof, submitted in this case with respect to the term "in common with" comports with the findings in *United States v. Washington:*

> The treaty language "in common with all citizens of the Territory" was probably introduced by George Gibbs, who was a lawyer and advisor to Governor Stevens. There is no discussion of the phrase in the minutes of the treaty councils, in the instructions to Stevens, or to the treaty negotiators, or in Stevens' letters of transmittal of the treaties. *There appears to be no phrase in the Chinook jargon that would interpret the term in any exact legal sense.*

384 F.Supp. 312, 356 (W.D.Wash.1974), *aff'd,* 520 F.2d 676 (9th Cir.1975), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (citations omitted; emphasis added). As this observation indicates and the record reflects, the Yakamas had, at best, a rudimentary understanding of the phrase "in common with." In light of their limited contact with whites prior to the Treaty negotiations, it is difficult to imagine a sophistication on the part of the Yakamas that would enable them to discern a precise legal meaning of this term.

Notwithstanding the Yakamas' lack of understanding of this language in a legal sense, the term "in common with" was presented as if understood and obvious to all present. Walker testimony at 24. In the Yakama language, those words would mean or suggest customary or public use, or open to everyone, such as open to general use without restriction. *Id.* at p. 30. Mr. Yallup testified that Skloom and Kamiakin, as well as other Yakama members, understood that their right to travel was not subject to any restrictions. Yallup testimony at p. 25. Therefore, as the Yakamas understood this term, no impediment was placed on their customary practice of travel or their right to travel to market. *Id.*

In looking to the circumstances surrounding the Treaty, it seems clear that the Yakamas understood the term "in common with" as common usage among Indians and non-Indians with no restriction placed upon tribal members. Contrary to defendants' assertions, no evidence suggests that the term "in common with" placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads. Instead, the term was understood by the Yakamas and Stevens alike to mean that the Indians retained the *right*

to travel the public roads, on and off-reservation, and that *right* would be exercised "in common with" non-Indians. In other words, both Indians and non-Indians would use the public roads simultaneously. The promises made and the Walla Walla Council, and the historical context in which they were given, supports the court's conclusion.

First, it is obvious that Stevens and his agents understood the importance of off-reservation travel to the Yakamas. Indeed, this provision was part of the "big sell": the Yakamas could maintain their traditional way of life, with improvements courtesy of the United States government, but they must sell most of their land and live within the confines of the reservation where they would be protected from "bad" white men. In return, Stevens guaranteed that the Yakamas "shall have the same liberties outside the reservation to pasture animals on land not occupied by whites, to kill game, to get berries and to go on the roads to market." P-2 at p. 69. This statement unequivocally secured the Yakamas' right to travel off-reservation in order to maintain their customs of hunting, gathering, and trade. More importantly, in entering the Treaty, the Yakamas relied on Stevens' and Palmer' promises that they would be able to maintain their cultural and subsistence practices which centered on their ability to travel.

Furthermore, Stevens and Palmer represented that the Treaty provisions were beneficial to the Yakamas. Stevens asserted that the Yakamas could live in peace and enhance their way of life if the they agreed to live within the designated reservation. *Id.* at pp. 39-41. Palmer promised that the government would protect the Yakamas and their rights if they signed the Treaty and moved onto the reservation. *Id.* at pp. 52-53. Finally, Stevens and

Palmer explicitly guaranteed that the Yakamas would retain the right to travel outside of the reservation in pursuit of their traditional practices of fishing, hunting, and gathering, as well as taking goods to market.

In exchange for the retention of the right to travel outside of the reservation, Stevens and Palmer explained that the tribes must agree to allow roads, including railroads, to be constructed within the reservation boundaries. These were the terms of the bargain; no reference is made to other conditions such as payment for or maintenance of public roads, either on or off-reservation. Rather, the accessibility of the public roads was described as an advantage for the Yakamas, without any mention of possible disadvantages, such as paying for or maintaining public roads. *See, e.g.*, P-2 at pp. 64, 70.

No assertion by Stevens at the Treaty Council contained any language that the Yakamas would interpret as a restriction of their right to travel. *See supra* pp. 1243-1244. Likewise, neither the Treaty language itself nor statements made during the Treaty negotiations suggested that "in common with" meant that Indians would be subject to travel restrictions applicable to non-Indians. Thus, the Yakamas would have naturally understood that they would be able to travel the public highways without restriction.

Moreover, when viewed in historical context, it is unlikely that Stevens would have intended to place restrictions on the Yakamas' right to travel. As explained above, Stevens' primary goal was to secure vast amounts of land and therefore reach an agreement with eastern Washington tribes as quickly as possible. Additionally, Stevens was well aware of the Yakamas' far-ranging

patterns of travel and the importance of travel to Yakama culture. Stevens also knew that the Yakamas, along with other tribes, had expressed reluctance in entering a Treaty with Stevens and the United States government. *See* P-14, D-218; P-15, D-344; P-17, D-335.[11]

Under such circumstances, any indication by Stevens to restrict the tribes' off-reservation travel rights would have been met with hostility from Yakama leaders and the other 1800 tribal members in attendance at the Walla Walla Council. Therefore, in this context of the Treaty negotiations – the pressure placed on Stevens to conclude a treaty with the Yakamas, and the importance of the land held by the Yakamas, both for settlement and transportation purposes – it is inconceivable that Stevens would have raised an issue or intended a condition that might have derailed the negotiation process.

Finally, pursuant to the canons of construction, Stevens' intentions are irrelevant unless they were clearly communicated to and understood by the Yakamas. *See, e.g., Fishing Vessel,* 443 U.S. at 676, 99 S.Ct. at 3067 (treaties must be construed as Indians would have naturally understood terms). No evidence suggests that Stevens communicated an intent to restrict the Yakamas' right to travel, such as demanding payment or fees for the construction of public roads. Hence, the language of the Treaty, when viewed in historical context as the Yakamas

[11] Some Yakamas had expressed their distrust of whites during visits by McClellan and Bolon, and Chief Kamiakin had been warned by the local Catholic missionaries to proceed cautiously with the whites when entering treaty negotiations. P-14, D-218; P-15, D-344; P-2 at p. 199, n. 58.

would have understood it, unambiguously reserves to the Yakamas the right to travel the public highways without restriction for purposes of hauling goods to market.

A specific colloquy between the court and Dr. Walker best exemplifies the Yakamas' understanding of the Treaty and their right to engage in off-reservation travel. During trial, the court propounded the following hypothetical:

> Assume for a moment that [Stevens] had suggested to these people banded together down there . . . suppose he said now, are you going to use the roads, you can have access to these roads, the public roads, and have the right to travel in and about some, but these roads cost money and we're going to expect you to make some contribution to their construction and maintenance, realizing that you don't have a lot of money in an ordinary sense of the word, you might have to contribute labor, manpower, that sort of thing, and instruct them and so on. What's your view of the effect that that would have had on the treaty negotiation?

Dr. Walker responded:

> It's my view that the tribe w[as] thinking at the time that well, we're giving up something on the order of 10 million acres. We are agreeing to go on the reservation. We are agreeing to let them build roads across the reservation. We are giving up the possibility of making warfare against our neighbors. We are giving up lots of things.
>
> For that, in turn, we are getting certain things, among which included a blacksmith, among which included the rights to use the roads and to continue fishing. My view of the reaction is that it would have been one of incredulity.

> *Having given up so much already, why should we also be required to give up yet more in order to retain a right that's already ours anyway?*

Walker testimony at p. 28-29 (emphasis added).

Indeed, why would the Yakamas knowingly agree to limit their right to travel, a right upon which their very survival relied? The record clearly demonstrates that the Yakamas understood the Treaty to preserve their right to travel, much as it secured their right to fish in usual and accustomed places. This right was secured unconditionally and without restriction. Accordingly, the Treaty precludes the state from imposing licensing and permitting fees and registration requirements indirectly exacting such fees on Indian-owned trucks when hauling tribal goods to market.

Even if the Treaty language was ambiguous, the court would reach the same result. Clearly, the Treaty does not unambiguously *restrict* the Yakamas' travel on the public highways; as discussed above, the phrase "in common with" was never explained to the Yakamas. Thus, if the language is deemed ambiguous – a finding which is difficult to make in light of the explicit promises made to the Yakamas at the Walla Walla Council – the court is bound to construe the phrase "in common with" in favor of the Yakamas. The reason for this liberal construction has been cogently explained by the Supreme Court:

> [T]hese treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be

> interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1970) (internal citation omitted). Insofar as Article III, paragraph 1 of the Treaty is "ambiguous" or "doubtful," when resolved in favor of the Yakamas, the public highways clause reserves to the Yakamas the right to travel the public highways without restriction.

B. Defendants' Arguments

Despite the unambiguous promises made to the Yakamas, defendants argue that the Yakamas "must" have known that "in common with" meant that tribal members stood on the same legal ground as non-Indians for the purposes of financing and maintaining public roads. Defendants cite several bases as support for this argument, each of which the court addresses in turn.

1. Intent of Stevens and the United States

First, defendants specify the United States' assimilationist policy toward Indians, the mission of Stevens, and the intent of the United States and Stevens when entering the Treaty as evidence that the parties did not intend to reserve to the Yakamas a right to travel the public highways without restriction. Defendants claim that the primary purpose of the public highways clause was to allow government and public access to reservations for the purposes of building roads, railroads, and telegraph lines. Richards testimony at pp. 9-10. The secondary purpose, according to defendants, was to provide the

Yakamas with equal access to roads which citizens enjoyed, with no less or more responsibilities. *Id.* at 10.

As support for their position, defendants profess that the major thrust of United States Indian policy was to place tribes onto reservations and assimilate them into white culture. The government would teach them art of "civilization" by providing modern goods, farm equipment, and appropriate training in skilled trades. Consequently, Indians would become proficient agriculturalists and prepare to become citizens of the United States, after which time reservation land would be divided up in severalty and the excess sold. *Id.* at p. 9. Defendants contend that any intention on Stevens' part to guarantee the Yakamas the right to travel public roads without paying fees is not reflected by the Treaty minutes and would have been inconsistent with past federal policy relating to roads.

Defendants further argue that when Stevens and Palmer declared that the Yakamas would be free to take horses and cattle to market, they actually meant that the Yakamas would not be troubled by settlers when traveling on the roads. Defendants argue that the promises by Stevens and Palmer were consistent with the government's "assimilationist" policy, in that Indians, once "civilized" and raising horses and cattle, must have access to public roads in order to take their goods to markets in newly-established settlements. Richards testimony at pp. 59-60.

Similarly, defendants claim that the Treaty language securing the Yakamas' right to travel the public highways "in common with" citizens was intended to indicate that no restrictions – "aside from those that might be placed on

citizens" – would be placed on Indians when they traveled from the reservation to the public highways, such as a fences built or tolls imposed by unscrupulous settlers. Richards testimony at p. 64-65. Therefore, defendants maintain that the public highways clause was simply intended as a means to prevent the exclusion of tribes and their members from the public highways by the government or non-Indians.

Defendants aver that Stevens carefully ensured that the Yakamas understood the intentions of the government in entering the Treaty, as well as the actual Treaty provisions. *Id.* at 10. Defendants further maintain that the Plateau Indians, such as the Yakamas, were familiar with the political organizations of non-Indians from contact with white traders, explorers, missionaries, and Stevens' agents, and therefore would have known of the government's Indian policy and its intentions when treating with Indians. Thus, defendants argue that the Yakamas understood "in common with" to mean "that they, the Yakamas, could share equally with citizens the right to travel upon all, all public highways, and the right, unless its spelled out to the contrary, usually contains within that the concept that the right also has obligations." Richards testimony at p. 67. Accordingly, defendants contend that a fee for maintenance of public highways paid by Indians is not inconsistent with Stevens' intent at the treaty negotiations. *Id.* at p. 66; *see also* State Defendants' Trial Brief. The court finds defendants' contentions unsupported by the record and without merit.

First, the court is not convinced that Stevens or any other official of the United States intended to levy a tax against tribes for the use of public roads or to seek reimbursement for the maintenance of public roads. As

explained above, Stevens was under tremendous pressure to conclude treaties with various Indian tribes to free land for settlement and, with respect to the Yakama Indians, to secure the right to build a railroad through Yakama land. Directions given to Stevens to accomplish this task were simple and straightforward: consolidate the bands of tribes on as few reservations as possible, spend as little money as possible, and pay annuities in the form of useful goods rather than money. D-220; D-343. No instructions were given to place Indians on "equal footing" with non-Indians.

Dr. Walker confirmed this limited scope of Stevens' mission. When asked whether the government intended to accomplish a transition of the Indians into Western culture by entering into the treaty, Dr. Walker replied:

> I think that that's going a lot farther than what Stevens understood his mission was in getting the treaty signed. I think his mission was to clear the land as much as possible for the incoming White settlers and to provide a safe haven for the tribes with the guarantees to the tribes necessary for them to maintain their continuing way of life.

Walker testimony at p. 49. Even though Stevens and Palmer may have articulated their belief that acculturation of the Yakamas would benefit the tribe, they expressed no intent that the Yakamas would be assimilated with non-Indians. As the record clearly reflects, Stevens and Palmer were well aware of the distrust with which the Yakamas viewed the white man; neither would have risked a suggestion that likely would have ended the negotiations.

Moreover, during the Walla Walla Council, Stevens made no mention of a broad federal policy to assimilate Indians with non-Indians or place them in the same category as non-Indians. Rather, an inducement for the tribes' acquiescence was the express promise that no white man would be allowed to enter reservations absent the tribal approval. Stevens explicitly stated that "the white man and the red man" cannot live together, and guaranteed the tribes an Indian agent to protect them from "bad white men." P-2 at p. 41.

As Dr. Richards testified, the primary purpose in all treaties with Indians was to "extinguish all Indian title and rights and acquire the land, to preserve peace between Indians and non-Indians, to provide for reservations and the civilizing process that were already prescribed and to do so through annuities." Richards testimony at p. 44. Given the fact that Stevens and his agents viewed the Yakamas and other tribes at the Council as unlearned savages, it is highly unlikely that he would have expected payment from them in order to maintain public highways. *See Official Proceedings* at p. 9. Stevens and Palmer stated as much when explaining the idea of a public highway to the Yakamas:

> Now as *we* give you the privilege of traveling over roads, *we* want the privilege of making and traveling roads through your country, but whatever roads *we make* through your country will not be for your injury.

P-2 at p. 71. Further, evidence in the records suggests that Stevens planned to obtain federal funding for such projects, eliminating any necessity for payment by the tribes. *See* D-334.

Defendants fail to recognize that even if Stevens and the United States intended to limit the Yakamas' right to travel, that intent was not expressed at the Treaty negotiations. Without question, Stevens was in the superior position to express such an intent and ensure that the Yakamas understood that condition to be part of the bargain. In fact, the minutes of the Treaty negotiations reveal the expressed intentions to be quite the contrary. Stevens and Palmer repeatedly stated that it was *not* the intention of the United States to prevent tribes from hunting, fishing, gathering, or "going to the buffalo." P-2 at p. 44. Therefore, both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, with no conditions attached, except to allow the government to build roads through the reservation.

When pressed by the court where defendants' gleaned their interpretation of the Yakamas' "responsibilities," Dr. Richards ultimately acknowledged that the Yakama Treaty, as with most treaties, does not address whether responsibilities attach with the right to use roads:

> [I]t's simply assumed that the tribes are going to be able to use those roads also. No one ever says differently or, that I know of, tries to prevent this, but also . . . there's no one who says well . . . the Indians are going to have special rights or privileges on these roads.

Richards testimony at pp. 69-70. Thus, Dr. Richards conceded that no treaty imposes any obligation upon tribes in conjunction with their rights to use the roads. Defendants' argument, therefore, rests upon unstated and unexplained assumptions.

Finally, the sophisticated understanding of the federal government's Indian policy that the Yakamas supposedly possessed is belied by the way in which Stevens and Palmer communicated their proposals at the Walla Walla Council. Stevens referred to the President as the "Great Chief," public roads as the "great roads," and utilized other simplistic language when assuring the tribes that the Treaty was for their benefit. The record further indicates that Chief Kamiakin was given only a brief and superficial description of the United States by Captain McClellan prior to Treaty negotiations. P-14, D-218 at p. 16.

In sum, defendants present no evidence suggesting how the Yakamas understood the Treaty language as represented by Stevens and Palmer at the Walla Walla Council. Defendants merely point to the so-called intent of the federal government and Stevens when negotiating treaties. However, the court must construe the Treaty *as the Yakamas would have understood the language.* Defendants argument that the Indians understood the United States' underlying but unstated policy of assimilation and allocation is one the court views with incredulity, at best. Certainly, the Yakamas could not have been expected to understand scope and depth of United States Indian policy, such as it was, from their exposure to traders and missionaries or by spending a few weeks with Stevens and his agents.

It is true that the Treaty "nowhere explicitly states" that the Yakamas were to be free from state law or exempt from state taxes; however, that is not the relevant inquiry. *See McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973). "[A treaty] is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal

bargaining positions." *Id.* Rather, the scope of the Yakamas' right to travel must be divined according to the Yakamas' understanding of the Treaty language. Defendants offer nothing to convince the court that the Yakamas did not understand the unconditional promises given at the Walla Walla Council to reserve their right to travel.

2. Yakamas' Traditional System of Travel

Aside from arguing that federal policy and Stevens' intent foreclose the Yakamas from asserting a Treaty right to travel, defendants further claim that the parties did not intend to preserve the Yakamas' right to travel in order to maintain their traditional system of trade and exchange. Essentially, defendants assert that the parties did not intend to preserve the Yakamas' traditional travel customs because the Treaty language and negotiations reference public roads to be built by the government rather than Indian trails in existence at the time of the signing of the Treaty. Defendants further argue that the government intended to inhibit the Yakamas' traditional practices by placing them on a reservation. Therefore, defendants maintain that the Yakamas cannot claim a *secured* right to travel the public highways.

Defendants' distinction ignores the history which manifestly portrays the importance of travel to the Yakamas. As the record reflects, and defendants themselves admit, the Yakamas traveled extensively throughout the Northwest and beyond. *See supra* pp. 1238-1239 and exhibits cited therein. Their ability to travel provided the Yakamas with the means to exercise their aboriginal practices. Indeed, at the treaty negotiations, a primary concern of the Yakamas was that they retain freedom of

movement to continue their traditional practices of hunting, gathering, trade, and, of course, fishing, whether they did so by Indian trails or by the public roads that the government intended to construct. Furthermore, Stevens unequivocally promised that the Yakamas retained the right to travel the public highways in furtherance of their traditional fishing, hunting, and gathering practices. P-2 at pp. 33-35.

The right to travel was particularly important with respect to the Yakamas' right to fish, which was explicitly secured by the Treaty. As the Yakamas maintained fisheries outside reservation boundaries, most notably on the Columbia River, it was necessary for the tribe to retain its right to travel in order to preserve its fishing practices. It is undisputed that retaining the right to take fish at their usual and accustomed places was vitally important to the Yakamas. Fishing permeated every aspect of their lives, from providing sustenance, to furnishing goods for trade, to maintaining cultural and religious customs. Yallup testimony at pp. 10-12. If the right to take fish was essential to the Yakamas' way of life, then undoubtedly the preservation of the right to travel to their "usual and accustomed" fishing sites, either by Indian trail or a public road, was equally important.

Thus, the Yakamas would have clearly understood that the Treaty secured their right to travel much like it reserved their right to take fish. This conclusion is supported by the Treaty minutes, which reveal that the Yakamas were made fully aware of the future construction of public roads, including roads within and outside of reservation boundaries. P-2 at pp. 64, 67, 70. Through the public highways clause, the Yakamas preserved not only their aboriginal right to continue traveling off-reservation

to obtain their means of subsistence, but a continuing right to do so on public highways if and when they should be built. Consequently, the court finds that the Yakamas reserved the right to travel in pursuit of traditional practices.

The court further notes that the Treaty itself "secures to" the Yakamas their right to travel the public highways. P-1. The plain meaning of this term constitutes a guarantee of a right already possessed; no specific reference in the Treaty indicates that the right to travel off-reservation was not continuing. Richards testimony at p. 114. In fact, subsequent to the Treaty, a substantial number of Yakamas continued to travel off-reservation for trading, hunting, gathering, and fishing practices. *Id.* at p. 113.[12] Additionally, the Treaty "further secures" the right to take fish and hunt, indicating an intent that the right to travel was secured in the same manner as the right to take fish.

Finally, although the parties dispute whether the Yakamas retained a right to travel to maintain their traditional methods of subsistence and trade, the court finds any distinction insignificant. Even if, as defendants

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[12] According to Dr. Walker, the establishment of reservations did not disrupt the network of intratribal relations in existence prior to the treaty:

> I think that's one interpretation, but that's not mine. I would disagree with that. I think that it helped protect and enhance the protection that was available for the tribes against the incoming whites, while, at the same time, protecting their interrelationships which continued to be reflected in trade, marriage, religion, and other forms of interaction.

Walker testimony at p. 54.

vigorously argue, the Treaty was not intended to retain the Yakamas' right to travel to preserve their traditional system of trade and exchange, the Treaty was clearly intended to reserve the Yakamas' right to travel on the public highways to engage in *future* trading endeavors.

As the Treaty minutes reflect, Stevens unconditionally guaranteed that the Yakamas would have the right to take their horses and cattle and other goods to market. P-2 at pp. 64, 67. Defendants themselves maintain that the "market" communicated at the Treaty negotiations was limited to the white man's market. Walker testimony at pp. 46-47. In this case, the Yakamas are engaging in an arguably modern economic enterprise, as the Yakamas did not own logging trucks in 1855 and do not take logs to traditional markets. *Id.* at p. 59. Thus, even under defendants' analysis, the treaty guarantees the right to travel upon public highways, without restriction, in pursuit of such endeavors.

3. Actions of the Yakamas

Next, defendants claim that the actions of the Yakamas, both pre- and post-Treaty, indicate that the Yakamas did not expect or intend to be free of fees imposed for use of the public highways.

a. Pre-Treaty Actions

Defendants emphasize the fact that the Yakamas voluntarily branded their horses and cattle before and after the Treaty under Washington territorial law. D-297; Richards testimony at 84. Thus, defendants contend that the Yakamas could have anticipated the requirements for vehicle registration because territorial branding provisions

parallel existing registration and licensing laws applicable to vehicles. However, branding was utilized solely for identification purposes rather than for regulation of horses as a means of transportation. More importantly, no fee was charged for branding nor was branding performed by the State. D-297. Therefore, the court does not consider relevant the Yakamas' use of branding for identification purposes.

Additionally, defendants attempt to equate public highways with toll roads and ferries in existence at the time of treaty negotiations, presumably to show that the Yakamas were familiar with paying a fee for use of non-Indians' transportation services. Defendants claim that use of toll ferries and toll roads by tribes evidence the Yakamas' understanding that they would be subject to fees for use of public roads under the terms of the Treaty. However, at trial, plaintiffs elicited testimony that other Indian tribes, rather than the Yakamas, utilized toll ferries. Richards testimony at p. 118. Defendants concede that no specific document suggests that the Yakamas paid ferry tolls. *Id.* at p. 122. Defendants nevertheless maintain that the Yakamas "must" have utilized the ferries to cross the Columbia River while traveling to Oregon. However, as no evidence suggests that the Yakamas traveled by ferry, the court does not place great weight on this evidence.

With respect to toll roads, defendants presented evidence regarding Barlow Road in Oregon, constructed around Mount Hood to the Willamette Valley in 1846. This route was charted by the Oregon Legislature and became a toll road which required a fee for its use. Defendants maintain that the Yakamas "must have" known of Barlow Road because they traveled through the area "constantly"

en route to the Willamette valley. Richards testimony at p. 122. However, defendants offered no evidence showing conclusively that the Yakamas used Barlow Road. Even so, Barlow Road was an exception, because toll roads were uncommon prior to the Treaty. *Id.* Certainly, the concept of tolls was inconsistent with non-Indians' own experiences.[13]

In any event, even if defendants presented convincing evidence that the Yakamas paid tolls for use of ferries and roads, such evidence would have little relevance to the issue of the parties' intent when entering the Treaty. The fact that the Yakamas may have paid a road or ferry toll does not lead to the conclusion that they agreed or intended to pay for the use of public roads after ceding away millions of acres of land. The Yakamas' payment of tolls, although unproven by defendants, was not in the context of Treaty negotiations. Therefore, the court finds the existence of toll roads or ferries irrelevant to its inquiry.

b. Post-Treaty Actions

Next, defendants strenuously argue that the Yakamas' actions since the Treaty renounce the travel right that is now asserted. Defendants contend that until the 1980s, the Yakama Nation did not claim that the Treaty precluded vehicle license and registration fees. Defendants

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[13] In his highly-acclaimed biography of Meriwether Lewis, Stephen Ambrose recounts how Captain Lewis credited Indians – whose descendants treated at the Walla Walla Council some 50 years later – with having saved the expedition by generously sharing their trails over the mountains which shielded the Pacific Northwest. The Indians even furnished guides, all without conditions or compensation. Stephen E. Ambrose, *Undaunted Courage* (1996).

claim that the Yakamas' post-Treaty actions show that a Treaty right to be free from state vehicle licensing fees was never anticipated.

First, the court notes that it does not consider post-Treaty actions of the parties conclusive evidence of their intent when negotiating the Treaty absent unequivocal actions or statements by either party renouncing the Yakamas' right to travel. No caselaw suggests that the court interpret subsequent actions differently.

The cases cited by the Ninth Circuit in directing this court to examine subsequent actions – along with the Treaty language, history, and negotiations – clearly hold that subsequent actions cannot rewrite or expand a treaty beyond its clear terms "to remedy a claimed injustice or to achieve the *asserted understanding of the parties.*" *Choctaw Nation v. United States,* 318 U.S. 423, 432, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943) (emphasis added); *accord DeCoteau v. District County Court,* 420 U.S. 425, 447, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975); *see also Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206, 208 n. 17, 98 S.Ct. 1011, 1019-20, 1020 n. 17, 55 L.Ed.2d 209 (1978) (treaty with tribes "must be read in light of the common notion of the day and the assumptions of those who drafted them" in light of surrounding history and circumstances).

Defendants assert that a treaty cannot be written to remedy a perceived injustice against an Indian tribe; by the same token, this court cannot rewrite the Treaty to achieve what the state claims is the "asserted understanding of the parties." Because the court finds clear intent by the Yakamas and the government to retain the Yakamas' right to travel the public highways without restriction,

subsequent actions of the parties cannot defeat the parties' intent. Even if the Yakamas' actions were relevant to this inquiry, the court finds no actions which belie their claim.

As the record reflects, the Yakamas continued to travel off-reservation many years after the Treaty for fishing and sustenance purposes. With respect to the precise facts at issue in this case, tribal members did not begin hauling goods, specifically tribal timber, off-reservation until the late 1970s. In fact, Kip Ramsey testified that he was the first Yakama logger to transport timber from the Yakama reservation to Boise Cascade in 1978. Likewise, Delbert Wheeler did not begin his logging business until 1987. P-54. Therefore, the fact that individual plaintiffs or the tribe did not bring suit until 1981 does not diminish their claimed travel right under the Treaty.

Moreover, many valid reasons explain why individuals, especially tribal members, do not attempt to assert their legal rights. These reasons include lack of resources and fear or misunderstanding of the legal system. Indeed, the facts of this particular case demonstrate why Yakama Nation tribal members might be reluctant to challenge perceived violations of their Treaty rights.

Mr. Ramsey testified that he believed the Yakamas had free access to all public roads under the Treaty.[14] Once Tiin-Ma and Wheeler Logging drivers began hauling timber off-reservation and received citations for failure to obtain the proper licenses and permits, they successfully brought suit in federal and state court. Nevertheless, the

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[14] Mr. Ramsey testified that his great-great-grandmother was Chief Owhi's sister.

state continued to impose the challenged fees until this court ordered preliminary injunctions barring the imposition of the fees. Even then, state defendants continued to cite individual plaintiffs under a different statute. Therefore, it is easily understood why tribal members might consider it futile to pursue legal action.

The record illustrates that the Yakamas have often been reluctant to assert their claimed rights. According to a report from the Yakama Agency Superintendent to the Secretary of Interior dated August 22, 1906, Yakama Indians would be benefitted greatly from a Supreme Court decision and resulting decree defining the rights of Indians to fish on the Columbia River. However, the author of the report did not believe the tribe would take advantage of the Court's ruling:

> [T]hese fisheries are such a great distance from the agency that it is difficult to enforce the decree, as the Indians are timid and are not inclined to assert their rights. They greatly fear the courts and the threats of the white people who like to have a monopoly of the fisheries and exclude the Indians altogether if they could.

P-31, D-241 at p. 387.

The same could easily hold true today where the state refuses to abide by court orders and continues to impose fees held to be unlawful. P-51; P-52; P-53. Accordingly, the court gives scant consideration to the subsequent actions of the Yakamas when the circumstances surrounding the Treaty clearly evince an intent to secure the Yakamas' right to travel the public highways.

4. Conservation

Defendants further contend that license fees allocated for preservation and maintenance purposes are permissible, notwithstanding the Yakamas' Treaty travel right. Because the revenue generated by the challenged fee requirements is deposited into the highway fund to help maintain the highways, defendants claim that Supreme Court caselaw does not proscribe the fees at issue. This court finds otherwise.

In *Tulee v. Washington,* 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942), the appellant contended that the Washington statute which compelled him to obtain a license in order to fish for salmon violated the Treaty fishing right denoted in Article III, paragraph 2. *Id.* at 683, 62 S.Ct. at 863-64. In construing the Treaty fishing right, the Supreme Court reviewed prior decisions involving the language of Article III, the record reflecting the significance of tribal rights to hunt and fish, and the canons requiring liberal construction of Treaty provisions in favor of the Indians. *Id.* at 684-85, 62 S.Ct. at 864-65. Using this methodology, the Court concluded:

> [W]hile the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging a fee of the kind in question here.
>
> * * *
>
> The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not

> indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve.

Id. Thus, although the Court recognized that it was dealing with a nonexclusive right to fish, it still held that the imposition of licensing fees was an impermissible interference with the right provided to the Yakama Indian Nation by the Treaty.

In its Order Re: Subject Matter Jurisdiction, Intervention, this court noted that the fees at issue were predominantly revenue-raising rather than regulatory in nature. Ct.Rec. 133. Moreover, it is clear in this case that the regulatory purpose of these statutes – to discourage overweight travel on the highways – can be accomplished without the imposition of these fees. Indeed, plaintiffs concede that they will remain subject to the weight regulations imposed by the state which are designed to preserve the condition of the highways and will not challenge fines imposed for violations of those regulations. Further, nothing in the record suggests that these fees are "indispensable" to the preservation of the highways. The fees are not regulatory in themselves; rather they merely provide a source of revenue which the state *chooses* to devote a portion of towards the highway fund. The state could potentially obtain the revenue needed to build and maintain highways from different taxes. Therefore, the fact that the state uses such fees to maintain highways does not overcome the Yakamas' retained travel right.

TRIBAL SOVEREIGNTY CLAIM

Plaintiff Yakama Nation also claims that the State's registration requirements and licensing and permitting fees impermissibly infringe upon its tribal sovereignty right to regulate tribal members' exercise of the travel Treaty right. Plaintiffs argue that where a treaty reserve rights outside of reservation boundaries, the tribe has a sovereign right to regulate the exercise of that right by trial members. Defendants counter that plaintiffs fail to show that the State's off-reservation enforcement of state law substantially burdens the Yakama Nation's right to self-government.

Caselaw clearly establishes that tribal sovereignty, standing alone, does not preclude state jurisdiction over Indian conduct off-reservation. While Indian reservation lands and Indian income from on-reservation activities are generally not subject to the intrusion of state taxing authority, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 144 n. 11, 100 S.Ct. 2578, 2584 n. 11, 65 L.Ed.2d 665 (1980); *see, e.g., Organized Village of Kake v. Egan,* 369 U.S. 60, 75-76, 82 S.Ct. 562, 571, 7 L.Ed.2d 573 (1962) ("[S]tate regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government.")

In *Settler v. Lameer,* 507 F.2d 231 (9th Cir.1974), the court held that the Yakama Nation possessed the authority to enforce its fishing regulations off-reservation by

arresting and trying tribal violators upon their return to the reservation. *Id.* at 238. The court further held that the tribe could enforce its regulations by off-reservation arrest and seizure. *Id.* at 240. Although its holding was narrow, the court observed that the "determination of when and how the [fishing] rights may be exercised is an 'internal affair' of the Tribe." *Id.* at 237; *see also United States v. Oregon,* 787 F.Supp. 1557, 1566 (D.Or.1992), *aff'd,* 29 F.3d 481 (9th Cir.1994). The court explained that regulation of treaty-preserved rights was one of the last "remnants of sovereignty" retained by the tribe, and the court found immaterial the fact that the exercise of the Treaty right was off-reservation. *Id.*

The Ninth Circuit's holding in *Settler* demonstrates that once the court identifies a Treaty right held by the Yakamas, the tribe should be accorded deference in determining how to exercise that right. Further, the doctrine of tribal sovereignty supports an interpretation which allows the Yakama Indian Nation to regulate non-members' exercise of the Article III travel right. Although this doctrine cannot serve as an independent claim, it still exists as a "backdrop" against which Indian treaties must be read. *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 172, 93 S.Ct. 1257, 1262, 36 L.Ed.2d 129 (1973). Accordingly, the Yakama Nation's tribal sovereignty allows it to regulate and articulate the boundaries of the Treaty travel right.

Although the court interprets the Treaty travel provision as allowing plaintiffs to travel the highways without paying licensing or permitting fees, the court emphasizes that in exercising its *nonexclusive* right, plaintiffs must still comply with regulations imposed by the state which are designed to preserve and maintain the

condition of the roads. *See Tulee,* 315 U.S. at 685, 62 S.Ct. at 864 (state could not impose licensing fees on Treaty right to fish but could still impose regulations designed to conserve the resource).

Finally, the court notes that compliance with state registration requirements, absent the licensing fee, does not impose upon the Yakama Nation's sovereign right to regulate the exercise of the right to travel. First, the Yakama Nation presented no evidence to support that the registration of trucks, in and of itself, infringes upon its tribal sovereignty. Second, the Yakama Nation requires all vehicles to be registered in accordance with Washington law. Therefore, plaintiffs have not shown any infringement upon their right to regulate the exercise of Treaty rights. This issue is likely rendered moot by the tribe's concession that it does not oppose registration for identification purposes. Nonetheless, Washington law requiring registration for Indian-owned trucks, absent the licensing and tonnage fees, does not infringe upon the Yakama Nation's tribal sovereignty.

APPORTIONMENT CLAIM

Alternatively, plaintiffs argue that even if the Treaty did not retain the Yakamas' right to travel the public highways without restriction, the challenged fees are preempted by federal law because they are not pro-rated to account for actual off-reservation travel. *See Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), and *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Plaintiffs argue that any tax levied against on-reservation activities

is preempted by federal law and the tribe's retained Treaty and tribal sovereignty rights. Defendants counter that the fees in question are not the type subject to preemption, and if so, are "practically" tailored to reflect actual off-reservation use of state roads.

The parties filed cross-claims for summary judgment prior to trial. They agree that no material issue of fact exists and the court may determine the issue solely as a matter of law. The court reserved ruling on this claim, finding it more appropriate to rule on all claims simultaneously.

A. Facts

The parties do not dispute the facts relevant to this issue, and the court briefly recites them. All trucks involved in this case are operated on the highways at weights that require a monthly license. RCW § 46.16.070. A Yakama Indian who operates a truck both on and off-reservation pays the same monthly license fee regardless of the number of miles driven outside reservation boundaries. The fee is the same for non-Indians and Indians. The owner and operator of the truck are jointly responsible for proper licensing. Without proper licensing, a truck cannot obtain registration under RCW 46.16.010. Lack of proper registration is a misdemeanor under state law. *Id.*

Additionally, temporary tonnage permits are available for trucks weighing up to 80,000 pounds. RCW § 46.44.095. The permits are issued per day, with a five-day minimum. For logging trucks exceeding certain weights, annual log tolerance permits are also required. RCW § 46.44.047. A Yakama Indian who operates a truck inside and outside of reservation boundaries pays the

same permit fee regardless of the miles driven off-reservation. The fee is the same for non-Indians and Indians. Fees paid to the State of Washington for truck registration, licensing, and log tolerance permits are credited to the state motor fund and used primarily for highway purposes. RCW §§ 46.68.030, 46.68.035.

B. Discussion

Plaintiffs argue that levying a tax against on-reservation activities of tribal members, regardless of the nature of the tax, is preempted by federal law, the Yakama treaty, and the Yakama Nation's sovereignty rights. Plaintiffs maintain that the licensing and permitting fees essentially tax on-reservation travel because the fees are not tailored to reflect actual off-reservation use. Defendants counter that the challenged license and permitting fees are not subject to preemption, because the fees are not based on the value of the truck. Further, the state argues that even if the fees are subject to preemption, the fees are, in practical application, pro-rated to reflect off-reservation travel.

The court agrees with plaintiffs that the proper starting point for this determination is *McClanahan v. State Tax Comm'n,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). In *McClanahan,* the issue was whether Arizona could apply an income tax to reservation Indians whose income "derived wholly from reservation sources." 411 U.S. at 165, 93 S.Ct. at 1259. The Court first reiterated the policy that Indians should remain free from state jurisdiction and control within their political boundaries. *Id.* at 168, 93 S.Ct. at 1260. However, the Court noted:

> the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.

Id. at 172, 93 S.Ct. at 1262. Nevertheless, the Court found that the principle of tribal sovereignty remained relevant, "because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.*

The Court further observed that the tradition of Indian sovereignty, combined with the canons of construction applicable to treaties, lead to the inevitable conclusion that tribes retain absolute sovereignty within those lands reserved for the exclusive use and occupancy of tribes. *Id.* at 174-75, 93 S.Ct. at 1263-64. Thus, absent Congressional action conferring state jurisdiction over Indian land, Indian tribes retain "exclusive" jurisdiction over tribal members in Indian country.

Upon finding no legislative action that conferred state jurisdiction to permit taxation, the Court held that Arizona could not impose income taxes upon reservation Indians whose income is derived entirely from within the reservation. *Id.* at 179-80, 93 S.Ct. at 1266. The Court flatly rejected the state's attempt to distinguish income taxes from property tax: "However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the land it seeks to tax." *Id.* at 180-81, 93 S.Ct. at 1267. Several Supreme Court cases have applied

McClanahan in varying contexts, including those involving motor vehicles.

In *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), tribal members challenged Montana's assessment and collection of personal property taxes, specifically the personal property tax on motor vehicles owned by tribal members residing on the reservation. 425 U.S. at 467-69, 96 S.Ct. at 1638-39. The motor vehicle personal property taxes were based on the value of the vehicle and imposed on vehicles driven both on and off the reservation. Relying upon the reasoning in *McClanahan,* the Court held that Montana's personal property tax could not be levied against motor vehicles owned by tribal members who resided on the reservation. *Id.* at 480-81, 96 S.Ct. at 1644-45.

In *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), Washington state imposed an "excise tax" on motor vehicles which, like the tax in *Moe,* was based on the value of the vehicle and applied to Indian-owned vehicles used both on and off-reservation. 447 U.S. at 162, 100 S.Ct. at 2086. Washington argued that the excise tax was imposed for the "use" of state highways rather than a personal property tax, and therefore *Moe* was distinguishable. *Id.* at 163, 100 S.Ct. at 2086. The Court found the distinction meritless, noting that the tax was based on the value of the vehicle, rather than on the privilege of using the vehicle in the State. Moreover, the Court declared:

> While Washington may well be free to *levy a tax on the use outside the reservation* of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited. Had

> Washington tailored its tax to the amount of *actual off-reservation use,* or otherwise varied something more than nomenclature, this might be a different case.

Id. at 163-64, 100 S.Ct. at 2086 (emphasis added).

Finally, in *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993), the Court once again struck down imposition of registration fees and excise taxes as applied to Indian-owned motor vehicles within the reservation. 508 U.S. at 127-28, 113 S.Ct. at 1992-93. The Court again remarked that the result might have been different had the state "tailored its tax to the amount of actual off-Indian country use." *Id.* at 128, 113 S.Ct. at 1993 (internal quotes omitted). Under these principles, the court addresses plaintiffs' claim.

First, the court summarily rejects any contention by defendants that the fees involved are "practically" tailored to reflect actual off-reservation travel by Indian members. Defendants' argument that tribal members need not purchase a license so long as they remain on the reservation completely misapprehends the issue, as does the argument that tribal members can themselves pro-rate the fees by purchasing a license only for the months they intend to travel outside the reservation.[15]

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[15] Apparently, defendants argument that the fees are permissible if only imposed on trucks that leave the reservation is derived from Justice Rehnquist's dissent in *Colville.* However valid Justice Rehnquist's argument, and the court makes no judgment in that respect, the majority of the Court found that a use tax may be upheld if tailored to *actual* off-reservation use as opposed to *any* off-reservation

(Continued on following page)

The individual plaintiffs in this case travel both on and off the reservation virtually every day that they haul logs to market. Tribal members must pay the same fee whether they travel outside the reservation eighty percent of the time or five percent of the time. Therefore, the challenged fees are not tailored to reflect off-reservation use. Consequently, the sole issue is whether the licensing and permitting fees are taxes subject to preemption.

It is well-established that a state may impose non-discriminatory taxes for activities conducted off-reservation. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270-71, 36 L.Ed.2d 114 (1973). However, in the context of use taxes imposed on Indian-owned vehicles driven both on and off reservation, the state must apportion those taxes to account for actual off-reservation use of the state highways, because the state lacks jurisdiction to tax on-reservation activities of reservation Indians. *McClanahan,* 411 U.S. at 180-81, 93 S.Ct. at 1266-67; *Colville,* 447 U.S. at 163-64, 100 S.Ct. at 2086; *Sac and Fox,* 508 U.S. at 128, 113 S.Ct. at 1993.

In this case the fees are based on weight, rather than value, and the proceeds from the fees are placed in the state motor fund and used exclusively for highway purposes. Therefore, defendants correctly maintain that the fees are "essentially a tax for the use of heavy equipment on the public's highway facilities." State Defendant's Trial Brief at 32. However, the fees are applied to Indian-owned trucks driven both on and off-reservation. Therefore, the

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use. Therefore, the court does not consider this aspect of defendant's argument.

fees must be prorated to account for actual off-reservation use of the highways by tribal members. *Colville,* 447 U.S. at 163-64, 100 S.Ct. at 2086.

Moreover, the vehicles at issue are Indian-owned logging trucks hauling tribal timber to off-reservation markets. The court finds a distinction between plaintiffs' trucks and a vehicle that is driven off-reservation for reasons unrelated to on-reservation activities. Here, the vehicles are driven off-reservation to support tribal enterprises conducted within reservation boundaries. As such, the tribe has a special sovereignty interest that might not be present under different circumstances. The court recognizes that its ruling on plaintiffs' Treaty claim may render the apportionment issue moot. Nonetheless, the court alternatively finds that under *McClanahan* and its progeny, Washington's licensing and permitting fees – as currently structured – cannot be imposed against plaintiffs' logging trucks.

Conclusion

Treaties are a country's contracts. The solemn commitment of great nations, like the given word of good men, should be honored. It should not matter if the erosion of time and the bright glare of hindsight demonstrate that they were extravagant or ill-advised. The promises made at Walla Walla all those years ago were unconditional. They will be so enforced by this court.

Upon review of the trial testimony, admitted exhibits, and briefing of the parties, the court finds that Article III, paragraph 1, of the Treaty With the Yakamas unambiguously secures to the Yakama Nation and its members the

right to travel the public highways without restriction. Accordingly,

IT IS HEREBY ORDERED that Judgment shall be entered in favor of plaintiffs in accordance with the following:

1. Article III, paragraph 1 of the Treaty with the Yakamas of 1855 provides the Yakama Indian Nation with the right to travel on all public highways without being subject to licensing and permitting fees, or registration requirements exacting such fees, related to the exercise of that right while engaged in the transportation of tribal goods.

2. This Treaty right to travel, although secured to the Yakama Indian Nation, can be exercised by its individual members, and any Yakama-owned and operated corporation or business which is tribally licensed.

3. The Yakama Indian Nation has the autonomy to regulate and exercise the Treaty right to travel among tribal members and non-member agents or employees. However, the Yakama Nation's sovereign right to regulate the exercise of Treaty rights does not preclude state registration for Indian-owned trucks, so long as the licensing and permitting fees are not imposed.

4. The Yakama Indian Nation, its members, any Yakama-owned or operated corporations or business, and any non-members engaged in the exercise of the Yakama Indian Nation's Treaty right to travel must comply with state regulations designed to preserve and maintain the public roads and highways to the extent that those regulations do not impose a fee or surcharge on the Treaty right.

5. The Yakama Nation, its members, any Yakama-owned or operated corporation or business, must comply with state registration requirements solely for identification purposes to the extent that such requirements do not impose a fee or surcharge on the Treaty right.

6. The state's registration, licensing, and permitting fees for trucks are not tailored to account for actual off-reservation travel, and therefore are preempted by federal law. Therefore,

IT IS FURTHER ORDERED that plaintiff's Motion for Summary Judgment Re: McClanahan, Colville, Moe and Sac and Fox Pre-Emption Issues, **Ct.Rec. 274**, is **GRANTED** and defendants' Motion for Summary Judgment on Apportionment Claim, Ct.Rec. 269, is **DENIED**.

IT IS SO ORDERED. The Clerk is instructed to enter this Order and forward copies to counsel. The Clerk is further instructed to enter an Order of Judgment and forward copies to counsel.

APPENDIX I

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Since 1915, Washington has required registration and licensing of trucks according to gross weight, with higher weights bearing higher licensing fees. RCW §§ 46.16.070, 46.16.135. Trucks owned by individual Indians have never been exempt from such license fees.

2. Washington requires log tolerance permits for certain overweight trucks with payment of an accompanying fee. RCW §§ 46.44.047, 46.44.095. Individual Indians have never been exempt from such fees.

3. Washington law establishes traffic infractions for violations of the weight licensing requirements, and impose penalties for such violations. RCW §§ 46.16.010, 46.16.135, 46.16.140, 46.16.145. Fees paid to the State of Washington for truck registration, licensing, and log tolerance permits are credited to the state motor fund and used primarily for highway purposes. RCW §§ 46.68.030, 46.68.035.

4. Plaintiff-Intervenor Yakama Nation sells timber from lands held in trust by the United States for the benefit of the Yakama Nation and its members. Under the supervision of the Bureau of Indian Affairs, the Yakama Nation enters into timber sales contracts with purchasers. When possible, purchasers of tribal timber must employ tribal members. Ramsey testimony.

5. Plaintiff Richard "Kip" Ramsey, d/b/a Tiin-Ma Logging, and Delbert Wheeler, d/b/a Wheeler Logging, own logging trucks. Both Mr. Ramsey and Mr. Wheeler are enrolled Yakama Indians. Employed by purchasers of tribal timber, their companies haul timber for the purchasers to various sites designated by the purchasers. Some sites to which the timber is delivered is outside of reservation boundaries. When they haul timber, Tiin-Ma and Wheeler trucks operate on public highways at gross weights exceeding 55,000 pounds. P-54; Ramsey testimony.

6. While Ramsey and Wheeler principally haul tribal timber to the Boise Cascade mill in Yakima, they also haul timber to mills on the Columbia River, in Packwood,

Washington, and occasionally to mills in the State of Oregon. Drivers for Ramsey and Wheeler travel on roads within the reservation the majority of the time.

7. Both Ramsey and Wheeler engage in hauling logs at all times of the year when weather permits.

8. Defendants are the Chief of the Washington State Patrol (WSP) and Commercial Vehicle Enforcement Officers of the WSP authorized to enforce vehicle licensing laws and other state laws pertaining to highway use.

9. Defendant officers issued traffic citations to Tiin-Ma and Wheeler Logging drivers because Kip Ramsey and Delbert Wheeler neither paid applicable tonnage licensing fees nor obtained log tolerance permits for their trucks. Recently, defendant officers began issuing citations to Tiin-Ma and Wheeler drivers for the failure to possess proper registration. All of the state enforcement actions challenged in this case happened outside the boundaries of the Yakama Indian Reservation.

10. Under the laws of the State of Washington Yakama tribal members could not license their vehicles without paying the State registration and licensing fees. Testimony of Kip Ramsey; P-54.

11. Kip Ramsey and Wheeler Logging Company cannot license their logging trucks or secure tonnage and log tolerance permits without payment of State licensing, registration and tonnage fees. Testimony of Kip Ramsey; P-54.

12. Since the inception of State laws requiring vehicle licenses and fees, the State has enforced those laws by citing Yakama Indian vehicle owners who do not license or register their vehicles.

13. The State of Washington no longer cites Yakama Tribal members for traffic infractions inside reservation boundaries. This exemption includes vehicles which are neither licensed or registered by the State.

14. Criminal and "infraction" enforcement of licensing and registration laws of the State of Washington prevent the *Cree* and *Wheeler* plaintiffs herein from obtaining licenses, registrations, and tonnage permits for their trucks without first paying state licensing, and tonnage fees. Testimony of Kip Ramsey; P-54.

15. Plaintiffs Cree and Wheeler have been subjected to significant fines by the defendants because plaintiffs have not purchased licenses and tonnage permits in compliance with the laws of the State. *See* P-9. Plaintiffs, including the Yakama Nation, contend that the Treaty With the Yakamas of 1855 precludes the state from imposing licensing and tonnage fees against Indian-owned trucks hauling tribal goods to market.

16. *Cree* plaintiffs and Wheeler Logging, including Kip Ramsey and Delbert Wheeler, intend to comply with all State laws designed to "conserve" the public highways and agree to register their trucks with the State of Washington for identification purposes. Ct.Rec. 294.

17. On June 9, 1855, the United States and fourteen Indian tribes and bands entered into a treaty, the Treaty With the Yakamas (Treaty), 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1959). P-1.

18. Article III, paragraph 1 of the Treaty With the Yakamas provides:

> *And provided,* That, if necessary for the public convenience, roads may be run through the

said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways.

19. The Yakamas view the Treaty as a sacred document and place special significance to each part of the Treaty as it provides them with basic rights. Yallup testimony at pp. 9-10; Walker testimony at p. 12.

20. The Treaty With the Yakamas must be construed as the Yakamas would have naturally understood the language, with ambiguous phrases construed in their favor. If the Treaty language is unambiguous, it must be construed in accordance with its plain language, notwithstanding subsequent actions of the parties.

21. Article III, paragraph 1, of the Treaty With the Yakamas, when viewed in its historical context, unambiguously reserves to the Yakamas the right to travel the public highways without restriction.

22. Article III, paragraph 1 of the Treaty provides the Yakama Indian Nation with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.

23. Prior to and at the time the treaty was negotiated, the bands comprising the Yakama Nation engaged in a system of trade and exchange with other plateau tribes as well as with more distant tribes of the Northwest coast and plains of Montana and Wyoming. The Yakamas traveled south to the Willamette Valley and possibly

California for trading purposes. The Yakamas also traveled to fish on the Columbia River and its tributaries, to hunt at the "buffalo grounds" and in other regions of the Northwest, and to gather roots and berries in the mountains. P-5; P-14, D-218; P-15, D-344; P-17, D-335; P-21, D-329; Walker testimony at pp. 13-18; Richards testimony at p. 12.

24. The Yakama system of trade and exchange was necessary to obtain goods that were otherwise unavailable to them but important for sustenance and religious purposes, such as buffalo byproducts and shellfish. Yallup testimony at pp. 12-15, 21-22; Walker testimony at p. 16. Items Yakamas traded included fir trees, lava rocks, horses, and various species of salmon. Yallup testimony at pp. 12-15.

25. The Yakamas also traded with non-Indians, particularly the Hudson's Bay Company, to obtain other goods. P-6-8; P-14, D-218. Walker testimony at 13-18.

26. Bands comprising Yakamas, particularly Klickitats, were well-known for their inherent trading ability. P-14, D-218; P-15, D-344; Walker testimony at p. 16.

27. Travel to other regions was essential for the maintenance of the Yakama way of life. Travel enabled the Yakamas to fish, hunt, gather, trade, and maintain intermarriage cultural ties. The Yakama also obtained fish and other aquatic resources, large and small game, decorative objects, buffalo products, and other items essential to their religious practices and ultimately their survival. P-14, D-218; Yallup testimony at p. 22-24. Walker testimony at pp. 13-14, 17.

28. Subsistence activities of the Yakamas required regular, extensive travel throughout the Plateau and in the neighboring Plains. The Yakamas joined with eastern groups, such as the Nez Perce and Flathead, to journey into the Plains to hunt bison and to trade. Further, the Yakamas traveled to the mountains for hunting, berry and root-gathering. P-14, D-218; P-15, D-344; Walker testimony at p. 17.

29. Travel was especially important to the Yakamas to pursue their fishing practices. The Yakamas maintained fisheries on the Columbia River and followed salmon runs as they moved through Yakama territory. Fish was, and is, a dominant staple of Yakama life for sustenance, religious, trade, and medicinal purposes. Yallup testimony at pp. 10-12; Walker testimony at pp. 17-20; P-14, D-218.

30. The Yakamas enjoyed free and open access to trade networks in order to maintain their system of trade and exchange. Walker testimony at pp. 13-18; Yallup testimony at p. 22.

31. Prior to the negotiations of the Treaty, Governor Stevens and his subordinates were aware that the Yakamas traded both on the Pacific Coast and traveled to the Columbia River to fish and to the plains to hunt buffalo. They were also aware of the importance of travel and trade to the Yakamas and their way of life. P-2; P-14, D-218; P-15, D-344; Walker testimony at p. 22.

32. At the time of the Treaty the United States did not charge fees for travel on its public highways in the Washington Territory.

33. Yakamas' contact with whites prior to the Treaty resulted in native use of horses and firearms, which had

changed their traditional tribal practices with respect to travel and hunting. Richards testimony at p. 9.

34. Yakamas' contact with whites prior to the Treaty was limited to explorers, traders, Catholic missionaries, and perhaps some settlers, although few had settled in the Yakima Valley prior to the Treaty negotiations. Richards testimony at 12-16; P-14, D-218.

35. At the time of Treaty negotiations, Isaac. I. Stevens was the Territorial Governor of the Washington Territory, Superintendent of Indian Affairs for the Washington Territory, and Chief Engineer of the Northern Division of the Pacific Railroad Surveys chartered by Congress to explore the possibility of a transcontinental railroad route. Richards testimony at pp. 23-24; P-14, D-218.

36. Stevens was pressured to quickly negotiate treaties with Eastern Washington tribes in order to free land for settlement and road-building purposes. The Oregon Donation Act, allowing for settlement without extinguishment of Indian title to land, increased the urgency for land. P-23; D-215; D-216, D-334.

37. Additionally, gaining access to the Yakama Reservation for purposes of building a railroad to Puget Sound was of vital importance to the United States and Stevens. P-23; D-216.

38. The United States believed that gaining Yakamas acquiescence to the roads across their reservation was a different and special case. The United States intended this road to be a major thoroughfare to the coast and accordingly was willing to accommodate many of the

demands of the Yakamas. P-14, D-218; P-15, D-344; P-23; D-291.

39. Stevens sent Captain George McClellan, Andrew Bolon, and James Doty to meet with the Yakamas. These men explained in general terms the intent of the federal government to treat with the Yakamas and described the anticipated provisions of the Treaty. P-14, D-218; P-15; D-344; P-17, D-335; P-24, D-348.

40. Statements by Governor Stevens and his employees prior to the Treaty negotiations and the statements of Governor Stevens and General Palmer at the Treaty negotiations reflect the importance to the United States of roads and railroad building across the Yakama Reservation. P-2; P-14, D-218; P-15, D-344; P-16; P-17, D-335; P-23; P-24, D-348.

41. Stevens' representatives found Indians who spoke Chinook jargon to interpret for them with the Yakamas and other Indians during the Treaty negotiations, even though Chinook jargon was not the primary language of any tribe. P-2; P-17, D-335; Walker testimony at pp. 38-40.

42. The Treaty proceedings formally commenced on May 29, 1855, in the Walla Walla Valley in southeastern Washington. In addition to Stevens and General Joel Palmer, Superintendent of Indian Affairs for the Oregon Territory, approximately sixty non-Indians were present. Over 1800 tribal members, including Yakamas, attended. P-2.

43. At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to fish, hunt, and gather, and trade. P-2.

44. Stevens represented to the tribes that entering into a Treaty with the United States would protect the tribes from "bad white men" and enhance their standards of living by providing agricultural equipment and training, blacksmiths, carpentry shops, and schools. P-2 at pp. 39-41, 49, 52-53. Stevens guaranteed that the terms of a Treaty would be "carried out strictly." P-2 at p. 55.

45. In discussing the purpose for the creation and placement of the Yakama Reservation, Stevens told the assembled Indians:

> I will give briefly the reason for selection [of] these two reservations. We think they are large enough to furnish each man and each family with a farm, and grazing for all your animals. There is especially in winter grazing on both reservations. There is plenty of Salmon on these Reservations, there are roots and berries, there is also some game. You will be near the great road and can take your horses and your cattle down the river and to the Sound to market.

P-2 at p. 64.

46. Stevens repeatedly assured the Yakamas that they would be allowed to travel the public roads outside the Reservation "to pasture animals on land not occupied by whites, to kill game, to get berries and to go on the roads to market. P-2 at p. 69; *see also* P-2 at pp. 44, 67, 98.

47. Palmer reiterated the statements made by Stevens when he stated: "My Brother has stated that you will be permitted to travel the roads outside the Reservation." P-2 at p. 70. He further commented:

> Now as we give you the privilege of traveling over roads, we want the privilege of making and

> traveling roads through your country, but whatever roads we make through your country will not be for injury.

P-2 at p. 71.

48. The statements of General Palmer reflect that in consideration for allowing the Yakamas to travel on the public highways, the United States bargained for the right to run highways and railroads inside the reservation. P-2 at pp. 70-71.

49. General Palmer's statements assured the Yakamas that roads across the reservation would be of no injury to the Tribe. P-2 at p. 71.

50. In reliance on the promises made by Stevens and Palmer, the Yakamas agreed to enter into the Treaty on June 9, 1855.

51. The Minutes of the Treaty proceeding reflect that the issue of highway travel by the Yakamas outside their reservation was broached several times, reflecting the importance of off-reservation travel to the Yakamas.

52. The Minutes of the Treaty proceedings contain no mention of restrictions upon the right of travel on the public highways, nor is there mention of the possible assessment of fees for that travel. P-2.

53. After the Treaty was concluded, the Yakama Indians continued to travel and fish much as they had prior to Treaty negotiations. P-26, D-224; P-30, D-237; P-44, D-250; D-223.

54. The State of Washington did not impose any licensing or vehicle registration fees for road purposes until at least 1905.

55. In 1932, approximately 128 Indian-owned vehicles were licensed pursuant to Washington law. However, it was estimated that on-reservation Indians owned approximately 500 vehicles during that year. P-47, D-451.

56. In 1986, the Yakama Nation Tribal Council enacted a regulation providing for Tribal regulation of member owned vehicles. D-280.

57. The Yakama Nation and its members consistently objected to State schemes of taxation for the purpose of building roads across the Reservation and state financing proposals that would charge the Yakamas. Yallup testimony at pp. 54-55; P-40; P-45, D-450; P-48, D-465.

58. Since the inception of Tiin-Ma Logging's log hauls, plaintiff Kip Ramsey has protested the defendant's registration, licensing and tonnage fee collection system.

59. Individual plaintiffs previously and successfully litigated their Treaty right to travel in state and federal court. P-51; P-52; P-53. In each case, a court found that Washington truck licensing and permitting fees violated plaintiffs' Treaty travel rights.

60. Article III, paragraph 1, secures rather than restricts the Yakamas' right to travel the public highways "in common with" non-Indians. However, neither the Treaty language nor statements made during the Treaty negotiations define the scope of "in common with." No equivalent of this phrase exists in Chinook jargon. P-1; P-55; P-56; Walker testimony at p. 24. At best, the Yakamas had a rudimentary understanding of the phrase "in common with."

61. In the Yakama language, the term "in common with" would suggest public use or general use without restriction. Therefore, as the Yakamas understood this term, no impediment would be placed on their right to travel. The most the Indians would have understood, reading the Treaty as a whole and its interpretive Minutes, of the term "in common with" and "public" was that they would share the use of the roads with whites. Walker testimony at 30.

62. Reading of the Treaty language as a whole reflects that the term "public highways" should be read with its common understanding, meaning a road open to all or for common usage.

63. Stevens and his representatives, both prior to and at the Treaty negotiations, clearly indicated that the roads they were discussing with the Indians were "public" roads open to all the settlers. P-2; P-17, D-335 at pp. 4, 7, 11, 14, 15; P-23; P-24, D-348.

64. The term "in common with" in Article III implies that the Indian and non-Indian use will be joint but does not imply that the Indian use will be in any way restricted.

65. Stevens and Palmer promised, and the Indians understood, that the Yakamas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, and extent.

66. Stevens' and Palmer's statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors.

67. The "great roads" referred to by Governor Stevens in the Treaty Minutes included proposed roads across the Yakama Reservation which were intended to provide access to Puget Sound. There was no suggestion that the Yakamas use of them would be restricted in any way. P-2 at pp. 64, 76.

68. The language of Article III of the Treaty reflects the promises made by Stevens and Palmer in the Treaty discussions and guarantees to the Yakamas the right of free use of the public highways. P-1; P-2.

69. The minutes of the Treaty proceedings reflect that unrestricted travel upon the public highways outside reservation boundaries was an issue of significant importance to both the Yakamas and Governor Stevens. P-2.

70. The Minutes of the Treaty proceedings and the language of Article III reflect no restrictions upon the right of the Yakamas to use the public highways, either for traditional practices of fishing, hunting, gathering and trade, or for future economic endeavors. P-1; P-2.

71. The fishery language of Article III, paragraph 2, is identical to the public highway language contained in Article III, paragraph 1. P-1. Nothing appears in the factual record which would lead the court to interpret the identical public highway language differently than the manner in which the fishery language has been interpreted.

72. In the historical context of the Treaty, including Stevens' mission to free vast amounts of land for settlement as quickly as possible and the Yakamas' reluctance in entering a treaty with the United States, it is unlikely

that Stevens intended to restrict the Yakamas travel in any significant manner.

73. No evidence suggests that Stevens communicated an intent to restrict the Yakamas' right to travel for fishing, hunting, gathering, and trade purposes. Further, Stevens did not communicate an intention to assimilate Yakamas with non-Indians or otherwise place the Yakamas on "equal footing" with non-Indians.

74. Evidence suggests that Stevens intended to rely upon federal funds for the construction of roads in Washington Territory. D-334.

75. The branding of horses was not a method of "registering" the Yakamas' method of transportation for purposes of State regulation. D-297. Rather, the branding of horses was a means whereby Yakama Indians and others could identify their horses and cattle. The branding of horses by Yakama Indians is not inconsistent with the Yakamas' claim of free travel upon the public highways.

76. No evidence shows that the Yakamas utilized toll roads or ferries prior to the Treaty. Moreover, the Barlow Road toll charge was the exception rather than the rule at the time of the Treaty. Richards testimony at pp. 122.

77. Even if the Yakamas had paid tolls for use of the Barlow Road or ferries, such actions would not be inconsistent with their claimed Treaty right to travel, because payment of such tolls was not within the context of Treaty negotiations.

78. The fact that plaintiffs did not assert a Treaty travel right with respect to hauling tribal goods to market

until 1981 does not diminish their claimed right. Individual plaintiffs did not begin hauling goods off-reservation to outside markets until the 1970s.

79. The challenged truck licensing and permitting fees are revenue-raising rather than regulatory in nature. Ct.Rec. 133. The regulatory purpose of these fees can be accomplished without the imposition of fees because plaintiffs maintain they will remain subject to the weight regulations so long as a fee is not imposed. Further, plaintiffs will not contest a fine imposed for violations of the weight regulations.

80. The Treaty right to travel, although secured to the Yakama Indian Nation, can be exercised by its individual members, and any Yakama-owned and operated corporation or business, which is tribally licensed.

81. The Yakama Nation's retained sovereignty under its Treaty includes the right to regulate the conduct of its members in the exercise of Treaty rights both on and off the Yakama Reservation. *Settler v. Lameer,* 507 F.2d 231 (9th Cir.1974).

82. The Yakama Nation's retained sovereignty under the Treaty reserves to it the right to determine what activities its members may exercise off the Reservation.

83. The Yakama Indian Nation has the autonomy to regulate and exercise this right through the use of member and non-member agents or employees. However, the Yakama Nation's sovereign right to regulate the exercise of Treaty rights does not preclude the state's registration requirements for trucks, so long as the licensing and permitting fees are not imposed.

84. The Yakama Indian Nation, its members, any Yakama-owned or operated corporations or business, and any non-members engaged in the exercise of the Yakama Indian Nation's Treaty right to travel must comply with state regulations designed to preserve and maintain the public roads and highways to the extent that those regulations do not impose a fee or surcharge on the Treaty right to travel on said public roads or highways.

85. The Yakama Nation, its member, any Yakama-owned or operated corporation or business, must comply with state registration requirements solely for identification purposes to the extent that such requirements do not impose a fee or surcharge on the Treaty right to travel.

86. Washington State has no statutory system to pro-rate licensing, registration or tonnage fees to reflect on and off reservation use by Indian-owned trucks based on the mileage driven in each jurisdiction.

87. The apportionment system proposed by defendants which allows for purchase of fees only during the time of use of an Indian-owned trucks off-reservation costs the same for a tribal member as it does for a non-Indian who has no exemption for on-reservation use. Therefore, Washington state licensing and permitting fees are not tailored to account for actual off-reservation use by Indian-owned trucks.

88. Plaintiffs possess a special sovereignty interest in hauling tribal goods, derived wholly from reservation resources, to off-reservation markets.

89. Under relevant Supreme Court caselaw, fees imposed on Indian-owned vehicles for the use of state

highways must be apportioned to account for actual off-reservation use.

90. The state's registration, licensing, and permitting fees for trucks are not apportioned to account for on-reservation travel, and therefore are preempted by federal law.

APPENDIX II

The court reviewed the following exhibits in this case:

Plaintiffs' Exhibits

P-1	P-15	P-35
P-2	P-17	P-36
P-4	P-19	P-37
P-5	P-20	P-40
P-6	P-21	P-44
P-7	P-22	P-45
P-8	P-23	P-47
P-9	P-24	P-51
P-10	P-26	P-52
P-11	P-28	P-53
P-12	P-30	P-54
P-13	P-31	P-55
P-14	P-32	P-56

Defendants' Exhibits

D-204	D-269	D-315
D-205	D-275	D-317
D-206	D-277	D-318
D-207	D-278	D-334
D-208	D-280	D-335
D-209	D-281	D-336
D-210	D-282	D-337
D-211	D-283	D-343
D-212	D-284	D-344
D-213	D-285	D-348
D-214	D-286	D-350
D-215	D-287	D-352
D-216	D-291	D-355
D-217	D-292	D-368
D-218	D-293	D-375
D-219	D-294	D-378
D-220	D-295	D-379
D-222	D-296	D-389
D-223	D-297	D-390
D-224	D-299	D-393
D-230	D-301	D-394
D-231	D-302	D-397
D-232	D-303	D-398
D-234	D-304	D-399
D-241	D-305	D-400
D-242	D-306	D-401
D-244	D-307	D-451
D-246	D-310	D-512
D-256	D-312	D-514
D-258	D-313	D-520

All other proposed exhibits were excluded pursuant to the Court's Order Re: Plaintiffs' Objections to Defendants' Exhibits (Ct.Rec. 297) and the court's ruling that all unchallenged exhibits shall be admitted, except those

exhibits not referenced by either party during trial or in trial memoranda.

APPENDIX J

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

KIP R. RAMSEY, d/b/a Tiin-Ma Logging Co., Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	) Civil No. CY-99-3070-WFN) PLAINTIFF'S LOCAL RULE 56(b) STATEMENT OF MATERIAL FACT RE MOTION FOR SUMMARY JUDGMENT

Pursuant to LR 56(b), Plaintiff submits the following material facts relied upon in support of his Motion for Summary Judgment.

1. Article III, Paragraph 1, of the Yakama Treaty provides:

> And provided, That, if necessary for the public convenience, (953) roads may be run through the said Reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways . . . [Emphasis added] Exhibit 1.

2. Article III, Paragraph 2, of the Yakama Treaty provides:

> The exclusive right of taking fish in all the streams running through our bordering said Reservations further secured the said Confederated Tribes and Bands of Indians **as also the right of taking fish at all usual and accustomed places in common with citizens of the territory, . . .** [Emphasis added].

3. The Minutes of the Treaty negotiations in Walla Walla in May and June, 1855, provide as following regarding the provisions of Article III, Paragraph 1:

* I will give briefly the reason for section [of] these two Reservation. . . . [sic] **You will be near the great road and can take your horses and your cattle down the river and to the Sound to market.** [Exhibit 2, Page 64];

* You will be allowed to pasture you [sic] animals on land not claimed or occupied by settlers, white men. **You will be allowed to go on the roads to take your things to market, your horses and cattle.** You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites.

All that outside the Reservation,. [Exhibit 2, Page 67];

* They shall have the same liberties outside the Reservation to pasture animals on land not occupied by whites, to kill game, to get berries and **to go on the roads to market.** [Exhibit 2, Page 69];

* My Brother has stated that you will be **permitted to travel the roads** outside the Reservation. [Exhibit 2, Page 70];

* Now as we give you the privilege of **traveling over the roads**, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for injury. [Exhibit 2, Page 71];

[All emphasis added]

* Gov. Stevens: I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this Reservation settlers cannot go, that he can graze his cattle outside the Reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, **that he can kill game and can go to buffalo when he pleases**, that he can get roots and berries on any of the lands not occupied by settlers. [Exhibit 2, Page 106].

4. Plaintiff Richard "Kip" Ramsey is an enrolled member of the Yakama Nation. Ramsey Declaration. As such, he is entitled to exercise the Treaty reserved rights of the Yakamas.

5. That the logs being hauled to off-Reservation markets by the Plaintiff are "tribal goods" or "tribal logs" as those terms were used by Judge McDonald and the

Ninth Circuit. Ramsey Declaration, Page 2. This fact is also admitted by the IRS in response to Plaintiff's Request for Admissions. Exhibit 8, Interrogatory No. 1.

6. That Plaintiff Ramsey cannot, without threat of prosecution or impoundment of his trucks, haul these "tribal goods" to market without first paying the heavy vehicle use tax on and the diesel fuel tax. Ramsey Declaration, Page 2.

7. Yakama travel for purposes of trade was essential to the Tribe's survival at the time the Treaty was signed. Yallup Declaration, Page 4, lines 25-27; Walker Declaration, Page 3, lines 7-10, 20-24.

8. That there was never any discussion at meetings between the Yakamas and United States representatives before or during the Treaty negotiations that the Yakamas' right to use the public highways would be conditioned upon payment of a fee or tax. Yallup Declaration, Page 4, lines 32-34; Walker Declaration, Page 9, lines 27-31.

9. that the Yakama Chiefs would not have signed the Treaty had they believed it would condition their ability to travel on the public highways upon the payment of a fee or tax. Yallup Declaration, Page 5, lines 1-4.

10. That continuation of travel outside the Reservation was of great importance to the Yakamas, and insuring its retention in the Treaty was a primary goal of the Chiefs who signed the Treaty. Yallup Declaration, Page 5, lines 18-32; Walker Declaration, Page 8, lines 1-8.

11. That continuation of off-Reservation travel was essential to survival of the Yakama culture. Walker Declaration, Page 3, lines 7-9; lines 17-24.

12. That continued free access to travel was a primary concern of the Yakama in 1855, and that concern was well known to the Chief U.S. Treaty negotiators, Governor Isaac Stevens and General Joel Palmer. Walker Declaration, Page 4, lines 16-22; Page 7, lines 1-13.

13. That the Yakamas and the United States, in the Treaty of 1855, specifically understood and agreed that the Yakamas would retain the right of off-Reservation travel on the highways, without the payment of fees or taxes of any nature. Walker Declaration, Page 7, lines 15-19.

14. That the Yakamas, in the Treaty negotiations, bargained for and understood that the Treaty provided unrestricted free of any fees or taxes, travel upon public highways that would in the future be constructed by non-Indians. Walker Declaration, Page 8, lines 1-8.

15. That the term "in common with" was not explained to the Yakamas during the Treaty negotiations. If it had been, the Yakamas would not have understood it to mean that their off-Reservation travel on the public highways, or the means by which that travel would be accomplished, would be subject to a fee or tax. Walker Declaration, Page 9, lines 27-31.

16. Plaintiff's governmental document exhibits contain contains [sic] the following material facts establishing the knowledge of the United States concerning the importance of trade and travel to the Yakama prior to the Treaty:

* **They manifest a peculiar aptitude for trading, and have become to the neighboring tribes what the Yankees were to the once Western States, the**

travelling retainers of notions; purchasing from the whites feathers, beads, cloth, and other articles prized by Indians, and exchanging them for horses, which they in turn then sell in the settlements. Their country supplies them with an abundance of food. The lower prairies afford Kamas and the mountains a great variety of berries. [Ex. 4] [Emphasis added]

* Of the five influential chiefs of this Tribe I succeeded in seeing but three, Shawawai, Sklome, & Te-i-yas. **Owhi, the brother of the last, was in the buffalo country** and Kami-ya-kan, the most important of all, was not to be found. . . . **All were gone after buffalo** but the old and poor. He said the same was the case with the Indians of that whole country east of the Columbia. They had heard that the buffalo crossed the mountains into the Flathead Valley and in consequence went in search of them. [Ex. 3, p. 1] [Emphasis added]

* With the tribes on Puget Sound ***they communicate continually during the summer by the Naches and main Yakima passes***, taking horses for sale to Nisqually, and to purchasing 'hai-qua', dried claims, and other savage merchandise, on their return. [Ex. 3, p. 5] [Emphasis added]

* I learned from him that a route exists from the Salmon Falls of the Snake to the Yakima, much shorter than any pursued by the whites, & without hills. He offered to show it, on the condition that he should be paid for his trouble if it proved as he represented. [Ex. 3, p. 5]

* A portion of the Yakamas, more particularly those living on the main river, in hunters' language, 'go to buffalo', joining the Flatheads in their hunt. [Ex. 6] [Emphasis added]

* this fact is probably true in the first place to their having been driven from their homes many years ago by the Cayuses with whom they were at war. They thus became acquainted with other parts of the country, as well as with the advantage to be derived from trade. It was not, however, until about 1839 that they crossed the Columbia, when they overran the Williamette Valley, attracted by the game with which it abounded, and which they destroyed in defiance of the weak and indolent Callapooyas. They still boast that they taught the later to ride and hunt. [Ex. 6, p. 3]

* These Indians are a proud & spirited race, very different from those of the coast, and ready to resist injustice or oppression. **It will be of greatest importance that any treaties made with them be not rejected, or their engagements left unfulfilled**. [Ex. 3] [Emphasis added]

17. Indians from the Yakama Nation and particularly those from the Yakima, Klickitat, Wenatchee, Columbia, Chelan, Entiat, and Kittitas aboriginal groups communicated continually with the Tribes on Puget Sound by the use of the Snoqualmie, Naches and Stevens passes as weather permitted.... *U.S. vs. Washington*, 384 F.Supp. 312, Finding of Fact #153.

18. At the time of the Treaties the Indians of the Yakama Nation used fisheries located in the Puget Sound

area for the purpose of obtaining salmon and steelhead primarily for their use. Some of these fish taken by the Yakamas were consumed by them and some were traded to other Indians. *Id.*, Finding of Fact #154.

19. In an extensive report on the Indian Tribes of the territory of Washington, dated March 4, 1854, George Gibbs had noted that the right of fishery was a subject 'concerning which difficulties may arise' and **that the Indians would require liberty of motion for the purpose of seeking fish in the proper season**. [Emphasis added]. *Id.*, Finding of Fact #25.

DATED this 14 day of September, 2000.

/s/ Tim Weaver
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